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# **CASES**

**DECIDED IN**

**THE HOUSE OF LORDS,**

**ON APPEAL**

**FROM THE COURTS OF SCOTLAND,**

**1824.**

**REPORTED BY**

**PATRICK SHAW, ESQ. ADVOCATE.**

**VOLUME II.**

**WILLIAM BLACKWOOD, EDINBURGH;**

**T. CADELL, AND J. BUTTERWORTH AND SON, LONDON.**

**MDCCCXXVIII.**



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Printed by Walker & Greig,  
Edinburgh.

*During the period of these REPORTS,—*

EARL OF ELDON, Lord Chancellor.

LORD GIFFORD, Depute Speaker.

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#### ERRATA.

Correct the Judgment in *MILLERS v. MILLER*, in Volume I.  
p. 315. as follows :—

Line 1. for ' interest,' read ' intent.'

Line 31. after the words ' marriage-contract,' insert these,—  
' according to the nature and amount of the provisions so made  
' after the date of the said marriage-contract.'



# CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND,

1824.

EARL OF WEMYSS AND MARCH, Appellant.—*Sugden—Jeffrey.* No. 1.

SIR J. MONTGOMERY, of Stanhope, Bart. Respondent.—  
*Moncreiff—Abercromby.*

*Entail—Sale—Statute 38. Geo. III. c. 60. and 39. Geo. III. c. 6. and 40.—Counsel.*

Held, (affirming the judgment of the Court of Session), 1. That it is not relevant to set aside a sale of part of an entailed estate for redemption of the land-tax under the above statutes, that the Court has committed an error in judgment as to the execution thereof. And, 2. That it is not a valid objection that the lands have been purchased by the Counsel, who subscribed pro forma the petition and other papers necessary for obtaining the authority of the Court for the sale.

IN the month of July 1799, William, late Duke of Queensberry, presented a petition to the Court of Session, stating that he was ' proprietor and heir of entail in possession of the estates of ' Queensberry, Tinwald, and March, lying in the counties of ' Dumfries and Peebles; and intends, under the authority of the ' Acts of Parliament, 38. Geo. III. c. 60. and 39. Geo. III. c. 6. ' and 40. to sell certain parts of these entailed estates, and to ' apply the prices to the redemption of the land-tax payable from ' them respectively.'

After mentioning that he had not exactly determined what parts of these three entailed estates were most proper to be sold, he suggested, that ' for the purchase of the land-tax of the estate ' of March, the lands of Easter-Happrew, in the parish of Stobo, ' at present let to Charles Alexander at a free rent of L.105,' should be sold. This petition was subscribed as Counsel by the respondent, who was then Mr Montgomery. The amount of

Feb. 25. 1824.

1st DIVISION.  
Lord Gillies.

Feb. 25. 1824. the land-tax payable from the March estate was L. 96. 18s. 11d.; and as by the above statutes it was requisite, in order to the redemption of it, that Government stock should be transferred affording a dividend equal to the land-tax and one-tenth more, the total amount necessary to be provided for was stock yielding L. 106. 12s. 9d.

By the 26th section of the above statute, 38. Geo. III. c. 60. it is enacted, that it shall be competent to the heir of entail in possession 'to apply by petition to the Court of Session, stating 'the amount of the land-tax payable out of the said estate, what 'part of the estate it is proposed to sell, and the rent or annual value of that part of the estate; and praying the Court, 'upon the allegations on these points being proved to the satisfaction of the Court, and it being shewn that the sale of the 'part of the estate proposed to be sold will not materially injure 'the residue of the estate remaining unsold, and that the part so 'proposed to be sold is proper (considering all circumstances) to 'be sold for the purpose aforesaid, to authorize such sale to proceed in manner herein after enacted; and the Judges of the 'said Court are hereby authorized and required to order such 'petitions to be intimated upon the walls of the Outer and Inner 'House of the said Court, in common form, for ten sederunt 'days; which intimation shall be a valid and effectual intimation 'and service to all intents and purposes, as much as if the said 'petitions had been personally intimated to, or served upon, 'all persons having, or pretending to have, an interest with 'regard to the said estate, as substitute heirs of entail, creditors 'on the said estate, or in any other way or character whatever; 'and such intimation being duly made, the Court shall proceed 'summarily in the matter, and shall authorize the sale of that 'part of the estate which the petitioner or petitioners are willing 'to sell, which the Court thinks ought to be sold for the purpose above-mentioned, and against the sale of which no sufficient reason is stated by any person having interest: and the 'extract of the decree of the Court authorizing the sale, shall 'be sufficient authority to the commissioners appointed by this 'Act to carry on the sale in the manner herein after directed.'

By the 28th section it is declared, that property so sold shall be as effectually transferred to the purchaser as if it had been held in fee-simple; and by the 8th section of the 39. Geo. III. c. 40. it is declared, that in addition to the above intimation the application shall be advertised weekly for two weeks in the Edinburgh Gazette. After these advertisements have been made, it

is enacted by the 9th section, ' that in case such sale shall be Feb. 25. 1824.  
' authorized by the Court, such sale shall be carried on by  
' public auction, at such time and on such notices as the Court  
' of Session shall from time to time direct: And farther, that  
' previous to any sale to be made in the terms and by virtue  
' of the powers so required and given by the said Acts, the  
' Court of Session shall cause articles of sale to be drawn up,  
' in the usual forms required by the law of Scotland for making  
' such sale effectual, and whereby the purchaser shall be taken  
' bound to pay the price to a trustee, to be named by the person  
' or persons in whose name or for whose behoof the said sale or  
' sales is or are carried on; and which trustee shall be approved  
' of by the said Court, and shall find security to their satisfaction,  
' that the sum or sums of money so to be paid to him by the said  
' purchaser or purchasers shall be duly and faithfully applied in  
' the manner and for the purposes herein and by the said Acts  
' enjoined and directed; and farther, that the said trustee, upon  
' receipt of the said price or prices, shall be forthwith bound to  
' pay the said sum of money into the Bank of England, to be  
' there placed to the account of the commissioners for the reduc-  
' tion of the national debt, to be by them applied in the manner  
' and for the purposes directed and specified by the said Act of  
' the 38th of his present Majesty; and the receipt of the cashier  
' or cashiers of the Bank shall be a full and sufficient discharge  
' to the said trustee, and to the said purchaser or purchasers, of  
' the sum or sums of money so agreed to be paid by him, her, or  
' them, in manner aforesaid; and which purchaser or purchasers,  
' upon payment of the sum or sums by the said trustee into the  
' Bank of England, as aforesaid, shall be entitled to demand and  
' obtain from the said heir of entail, or other person or persons  
' in whose name, or at whose instance, or for whose behoof, the  
' said sale or sales is or are carried on, such disposition, convey-  
' ance, or other title to the subjects so sold, containing all usual  
' and necessary clauses for rendering complete the right to the  
' same in favour of the said purchaser or purchasers, under the  
' direction of the said Court.' It is likewise enacted, ' that if any  
' action or suit shall be brought against any person or persons  
' for any thing done in pursuance of this Act, such action or suit  
' shall be commenced within six months next after the fact com-  
' mitted, and not afterwards.'

The petition of the Duke was intimated upon the walls of the Inner and Outer-House, and an advertisement was inserted weekly for two weeks in the Edinburgh Gazette in these terms:—



Feb. 25. 1824. ' Intimation.—That his Grace, William Duke of Queensberry,  
' has by petition, dated the 9th day of July last, made application  
' to the Court of Session for authority to sell certain parts of the  
' entailed estate of Queensberry, Tinwald, and March, situated in  
' the counties of Dumfries and Peebles, for the purpose of redeem-  
' ing the land-tax payable out of these estates, in terms of the Acts  
' of Parliament, 38. Geo. III. c. 60. and 39. Geo. III. c. 6. and  
' 40.—Of which public notice is hereby given to all concerned.'

A proof was then allowed and taken as to the amount of the land-tax,—the rent or annual value of the lands proposed to be sold,—and as to which lands it was most expedient to sell. From that proof it appeared, that the lands of Easter-Happrew had been let on a lease of 57 years at the above rent of L.105; that a grassum had been paid, the annual value of which was estimated at L.11. 14s.  $\frac{1}{2}$ d., so that the total annual value of the farm was L.148. 6s.  $\frac{1}{2}$ d.; but as the public burdens amounted to L.39. 17s.  $1\frac{1}{2}$ d., the free rent was L.108. 8s.  $11\frac{1}{2}$ d. In calculating the price at which the lands should be exposed, they were stated to be worth 24 years' purchase of the above free rent, making L.2602. 14s. 2d. But from this was deducted the sum of L.207. 2s. 7d. being the amount of the annual value of the grassum for the remaining period of the lease; so that the lands were estimated at the price of L.2395. 11s. 7d. At this price, accordingly, the Court appointed them to be exposed to sale, which, after several advertisements, was done before the Sheriff-depute of the county on the 1st of October 1801; and, after a keen competition between the respondent and Alexander, the tenant on the farm, the respondent was preferred at the price of L.3720, being thirty-four years' purchase including the value of the grassum, or thirty-eight years' purchase without the grassum. On the following day the respondent paid the price to Crawford Tait, Esq. writer to the signet, who had been appointed the trustee under the statute, and by him it was remitted to Mr James Chalmer, solicitor in London, who invested it in terms of the statutes on the 20th of the same month, and within four months thereafter the respondent was infeft in the lands. The land-tax, however, was not actually redeemed by the Duke till 1805.

During the course of these proceedings the respondent acted as counsel for the Duke, by subscribing the necessary papers; but it appeared that, till within two weeks prior to the sale, he had no intention of becoming a purchaser.

The Duke of Queensberry died in 1810, and, as the entail

prohibited alienations, the Earl of Wemyss, who succeeded as heir of the March estate, brought several actions of reduction of leases which had been granted by the Duke on grassums, in which, after a great deal of difficulty, he succeeded in obtaining decree setting them aside as in contravention of the entail. Feb. 25. 1824.

In the meanwhile, the respondent and the tenant had been allowed to remain in undisturbed possession of Easter-Happrew; but in the year 1819, the Earl of Wemyss brought an action against them, concluding for reduction of the act and warrant authorizing the sale, of the articles of roup, the disposition and the sasine, and also of the lease which had been granted to the tenant.

In support of this action the Earl maintained, that as the lease of Easter-Happrew was illegal, and liable to be reduced, the rent there specified could not be taken as the basis of calculation in fixing the price under the above statutes; that the lands were not only not those which, in all the circumstances, it was most expedient to have sold, but were the very reverse; and that, in carrying through the sale, the statutory requisites had not been observed.

The Lord Ordinary assoilzied the defenders, and the Court, on the 28th of February 1821, adhered.\*

The Earl of Wemyss then appealed and pleaded,—

1. That as the lease of Easter-Happrew had been granted in consideration of a grassum for a long period of years, and as it had been decided that such leases were null and void, it was impossible that it could be taken into consideration in estimating the real annual value of the lands; but nevertheless the upset price had been arranged on the footing that it was a good and effectual lease: that even supposing it could be recognized, still the annual value of the grassum ought to have been taken into view in fixing the upset price, whereas it had been rejected; so that the lands had been exposed at a price below that required by the statutes.

2. That, as the respondent had been counsel in the cause, he was disqualified from becoming a purchaser; and, at all events, as he thereby must have been intimately acquainted with all the circumstances, he was identified with the late Duke: and therefore, as the sale was, in the circumstances, a fraud upon the heirs of entail, the validity of which the Duke could not have maintained, so the respondent was liable to the same objection.

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\* Not reported.

Feb. 25. 1824.

3. That the requisites of the statute had not been observed, *first*, Because the petition did not represent the true annual value of the lands,—the rent being calculated from an illegal and void lease, and the value both of the grassum and of a crown vassalage having been kept out of view: *second*, Because the advertisements in the Gazette did not announce in specific terms the nature of the petition: and, *third*, Because the redemption of the land-tax had not been made for several years after the sale.

4. That the lands of Easter-Happrew being situated in the very heart of the estate, while there were others discontinuous which it would have been much more expedient to have sold,—a fact which the appellant was willing to prove,—he was entitled to be allowed that proof, and, upon instructing the fact, to restitution of the lands.

On the other hand it was maintained,—

1. That as the lease at the period of the sale was (like others in the same situation) regarded as perfectly good; and as the statutes did not apply to one kind of lease more than another; and as the purchaser was not required to be aware of the conditions of the deed of entail; and as, at all events, the price realized was capable of producing a great deal more than the true annual value of the lands; it was impossible that the respondent could be affected by the circumstance of such leases being afterwards held to be invalid.

2. That although it was true that the respondent was counsel for the Duke, yet he had merely signed the petitions for leave to sell as a matter of form, without being aware of their contents; and it was proved by documents in process, that he had not contemplated purchasing the lands till after the upset price had been fixed.\*

3. That the petition and intimations, and the whole procedure, were precisely in the terms prescribed by the statutes; and as the heirs of entail had at the time made no objection; and as the period for making any complaint was limited to six months; the appellant was not entitled *post tantum temporis* to insist on any objection in point of form, nor could the respondent be affected by any delay on the part of the Duke in redeeming the

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\* It is stated in the respondent's case, p. 8. in reference to the objection of his having acted as counsel, that 'all the Judges of the Court of Session, on the advising of the cause, stated explicitly, that the signing of such petitions as that of the Duke for leave to sell was a mere form, and that counsel constantly put their names to such proceedings without being aware of one word of their contents.'

land-tax; but, in point of fact, it had been redeemed in due time, Feb. 25. 1894. and prior to the appellant's succession to the estate. And,

4. That it was not relevant to allege that the lands of Haprew were not those which it was most expedient to have sold, and that it was a sufficient answer both to this and the appellant's other objections, that a purchaser could not be affected by any error in judgment committed by the Court of Session in the course of the due execution of the statutes.

The House of Lords 'ordered and adjudged that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

**LORD CHANCELLOR.**—As I have about ten minutes to spare, I will just give my judgment in that case of Wemyss and Montgomery. It was a case of a sale which was made of part of an entailed estate, being for the redemption of land-tax on other parts of that entailed estate, and likewise for a right to reduce a lease which affected a part of the estate which had been sold, the lease of which had been held to be invalid.

My Lords, it will be within your Lordships' memories, that Acts of Parliament have passed for the purpose of authorizing the sale of particular parts of an estate, which parties could not alienate, for the purpose of redeeming land-tax on other parts; and this took place very frequently in Scotland with respect to entailed estates, and has taken place in England where persons have not had a power of alienating; and the question here is, Whether, under the circumstances of this case, the purchase which had been made by the present Sir James Montgomery, then Mr Montgomery of the Scotch Bar, is a purchase which, under the circumstances stated to your Lordships, can be sustained.

My Lords, being most decidedly of opinion that that purchase cannot be impugned, I might content myself with simply stating to your Lordships, that, in my humble judgment, your Lordships should refuse to reverse the interlocutors complained of; but I am anxious to say a word or two on this case, because it may be necessary in that word or two to distinguish the grounds on which my judgment at least is formed, in this case, from that which affected the case of Vans Agnew.\* In that case, it was never meant by any body in this House to say, that if the Court of Session had been executing the Act of Parliament, (on the execution of which the question in that cause depended), that an error in the judgment of the Court of Session in the execution of the Act of Parliament would have affected any purchaser, or any person dealing on the authority of that judgment, such person dealing bona fide. The House there went on these grounds, among

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\* See ante, Vol. I. p. 333.

Feb. 25. 1824. others, that they did not conceive that the Court of Session was executing that Act of Parliament.

Now, in this case, I have not the slightest difficulty in saying, that the Court of Session was here executing the Act of Parliament under which the land-tax was to be redeemed; and it is impossible to hold, without establishing a doctrine, so full of danger, and so frightful, that nobody can look at it, that if a purchaser purchases under the authority of the Court of Session,—they addressing themselves to the due execution of the Act, and acting according to the powers vested in them,—if it happen that there is a mistake in their judgment, that the purchaser is to be made answerable for that mistake. I am clearly of opinion that cannot be.

Now, my Lords, in this case, we must hold that the lease of Alexander the tenant was a lease that could not have been held valid between the heirs of entail and the tenant; but at that period a lease such as this was understood to be, and certainly was, in this case itself, understood by the Court of Session to be a valid lease. They sell, therefore, after ascertaining the rent according to their notion,—they sell, after ascertaining the rent in the manner in which the Act of Parliament directed the worth and value of the property that was to be sold to be estimated; and if, in point of law, the Court of Session did mistake, it is impossible to inflict the consequence of that mistake on the purchaser. It was very ingeniously put, I think, by Mr Sugden, who asked, What if the tenant himself had bought this estate? What if Alexander had bought this estate, and had paid the price for it, of course deducting, as Sir James Montgomery in fact deducted, the value of this grassum? Why, my Lords, if Alexander the tenant had bought the estate under the authority of the Court of Session, exercising its judgment in the manner the Act of Parliament directed, that tenant would have been, as I think Sir James Montgomery is, safe in making the purchase.

My Lords, there is another reason which has induced me to say, rather contrary to your Lordships' practice, a word on this subject, which is this, that it has been attributed to the present Sir James Montgomery, then Mr Montgomery at the Bar, that he acted with a want of good faith in this proceeding;—always distinguishing, as we are in the habit of doing, that by fraud we do not mean that sort of malpractice which is denominated fraud out of Courts of Justice,—but that Mr Montgomery happened to be at that time a gentleman at the Bar, that he was consulted, or framed some petition, or looked at some of the pleadings that took place in the course of this transaction.

My Lords, as this sort of distinction between fraud in Courts, and fraud out of Courts, sometimes may be misunderstood out of Court, I do feel extremely anxious to say, that there does not appear to me, and I feel myself bound to say, that there is not the least ground in the world for any reflections of that kind whatever,—not the least in the world, my Lords. I go beyond that and say, the very nature of

his interposition—the extent of his interposition as counsel in that business, never can bring him within the authority of such cases as Mackenzie, which was quoted at the Bar; and therefore there is not the slightest reflection of that sort upon him. Feb. 25. 1824.

My Lords, another object was to reduce this lease, for Alexander, the tenant, is a party in the cause. If, however, the sale to Sir James Montgomery is a good sale, then there is an end of all right to reduce the lease on the part of those who were claiming to do so. But, my Lords, independent of that, there is another question, which is this, if Sir James Montgomery bought, subject to the lease; query, Whether any body can affect that lease, if Sir James Montgomery bought subject to the lease?

My Lords, on all these grounds it does appear to me, and I took the liberty of interrupting your Lordships at this time of the evening, as I was the only law Lord present at the time the cause was heard; and I take the liberty of stating it to be my humble opinion, that your Lordships ought to affirm the decision.

*Appellants' Authorities.*—1. Ersk. 1. 5. 3.; Laurie, July 27. 1814. (2. Dow, 556.)

SPOTTISWOODE and ROBERTSON—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No. 2.*)

Mrs MUDIE, and Trustees of the late JOHN AITKEN, Appellants.  
Clerk—Greenshields—Jeffrey—Jameson.

No. 2.

Mrs MOIR, and Others, Respondents.—Cranstoun—T. H. Miller.

*Deathbed—Revocation—Approbate and Reprobate.*—A party having executed a mortis causa disposition of his heritable property in liege poustie, excluding one of his heiresses portioners, with a power of revocation; and having executed a second disposition on deathbed in favour of the same parties, but making alterations affecting interests provided for in the first deed, and having revoked that first deed. Held, (affirming the judgment of the Court of Session), 1. That the heiress portioner was entitled to found on the revocation, as recalling the first deed; and, 2. That she was at the same time entitled to object to the disposition of the property, as executed on deathbed.

THE late Reverend John Aitken, minister of the parish of St Vigeans, and proprietor of the estate of North-Tarry, in the county of Forfar, had three nieces,—the respondent, Cornelia Isabella Aitken, wife of William Moir of Newgrange; the appellant, Jane Aitken, wife of James Mudie of Pitmuir; and Catherine Aitken, wife of James Ford of Finhaven,—these ladies being sisters, and co-heiresses portioners of Mr Aitken.

March 1. 1824.

2D DIVISION.  
Lord Pitmilley.

March 1. 1824.

On the 25th October 1805, Mr Aitken (who was then eighty years of age) executed a disposition and deed of settlement in favour of his three nieces, by which he conveyed to them his whole property, real and moveable, with the exception of a small piece of ground which he conveyed for behoof of his successors in the office of clergyman of St Vigeans, 'but reserving full power and faculty at any time in my life, or even on deathbed, to revoke, alter, innovate, or cancel these presents, in whole or in part, as I may think proper.'

On the 26th of May 1813, (at which time Mr Aitken was eighty-nine years of age), he executed a new disposition and deed of settlement, by which he disposed his estate to Mrs Mudie, and Mrs Ford, thereby excluding the respondent Mrs Moir, to whom he provided an annuity of L.120, and to her children L.1000, to be held in trust by Mr Mudie and Mr Ford for their behoof, and with both of which sums he burdened his disponees. In this deed he also excepted the above small piece of ground, and reserved to himself 'full power and faculty, at any time in my life, or even on deathbed, to revoke, alter, innovate, or annul these presents, in whole or in part, as I shall think proper, or to burden and affect the subjects heritably conveyed, as I may incline; dispensing with the delivery hereof, and declaring the same, or any alteration I may make, shall have the full effect of a delivered evident, whether found in my custody, or in the keeping of any other person, at the time of my death, any law or practice to the contrary notwithstanding.'

Towards the end of the year 1815, Mr Ford having become bankrupt, and his estates having been sequestrated, the agent who had prepared the previous deeds of settlement suggested to Mr Aitken, that as Mr Ford's creditors might possibly claim the share of the property belonging to Mrs Ford, he should execute a new deed, so as to prevent this being accomplished. Accordingly, on the 26th of April 1816, (at which time he was ninety-two years old), he executed a new deed of settlement, by which, while he disposed to Mrs Mudie as in the preceding deed, he conveyed the share of Mrs Ford to Mr Mudie and Mr Rattray, writer to the signet, as trustees for her behoof, excluding the jus mariti of her husband. The provisions to Mrs Moir and her children were also repeated, but in reference to them Mr Rattray was substituted as a trustee in place of Mr Ford.

There was also introduced at the usual place this clause:—  
'And further, I hereby revoke and alter all former dispositions, assignations or settlements, or latter wills or testaments, exc-

'cuted by me; reserving always to me my liferent right and March 1. 1824.  
'use of the whole subjects, heritable and moveable, above dis-  
'poned, and full power and faculty, at any time in my life, even  
'on deathbed, to revoke, alter, innovate, or annul these presents,  
'in whole or in part, as I shall think proper, or to burden and  
'affect the subjects hereby conveyed as I may incline, by a co-  
'diciil, or any other writing expressive of my intention.'

This deed was different from that of 1813 in these respects:—  
In the 1<sup>st</sup> place, It substituted trustees in place of Mrs Ford.  
2<sup>d</sup>, It excluded her husband's jus mariti. 3<sup>d</sup>, It recalled his  
nomination as a trustee, and appointed Mr Rattray in his room.  
4<sup>th</sup>, It declared Mrs Mudie and the trustees of Mrs Ford liable  
each for one-half only of the annuity and legacies, whereas, by  
the former one, these ladies were made liable conjunctly and  
severally. And, 5<sup>th</sup>, There was no exception of the piece of  
ground in favour of the clergyman of St Vigean. At the time  
of executing this deed Mr Aitken was upon deathbed, and he  
died within six days after the date of it.

Soon after this event, Mrs Moir, with concurrence of her hus-  
band, brought an action of reduction, on the head of deathbed,  
of the deed 1816, in so far as Mr Aitken had executed powers of  
disposing, but founding on it as containing an effectual revoca-  
tion of the deed in 1813.

In defence, it was maintained by Mrs Mudie and the trustees,  
that as the two deeds were substantially the same, and were in  
favour of the same disponees, and as the latter had been made  
merely to prevent Mr Ford's creditors from attaching the share  
of his wife, the deed of 1813 must be held as a valid and sub-  
sisting deed.

The Lord Ordinary having repelled the defences, and de-  
cerned in terms of the libel, and Mrs Mudie and the trustees  
having reclaimed, the Court ordered a hearing in presence,  
on advising which, their Lordships being equally divided, Lord  
Cringletie was called in; and his Lordship having concurred in  
the interlocutor of the Lord Ordinary, the Court, on the 2<sup>d</sup> of  
March 1820, adhered to that judgment.\*

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\* See Fac. Coll. 2d March 1820, Moir against Mudie, where the following is reported  
to have been the opinions of the Judges:—

'Lords Glenlee and Bannatyne thought that a general revocation in a deathbed deed  
'had some flexibility, so as to allow it to be adapted to what was evidently the intention  
'of the granter. They thought that the case of Coutts was properly decided by the  
'House of Lords, as it was apparent that the granter of the deathbed deed intended that



March 1. 1824.

Mrs Mudie and the trustees then appealed, and pleaded,—

1. That as the deed had been executed merely for the purpose of carrying into effect the previous deed of 1813, it was to be considered as immediately connected with that deed; that therefore it did not fall within the rule relative to deeds executed on deathbed, which applied only to such deeds as were executed for the first time, and not for the purpose of guarding against an objection or danger arising out of the terms of the previous existing deed; and that accordingly the principle on which the law of deathbed rested was, that where a deed, conveying away property, was executed at that time, it was presumed that it was executed by the granter, rather *ex fervore animi quam ex mentis deliberatione*, whereas here it was proved to have been executed to support the previously existing deed.

2. That supposing the deed were liable to reduction, still the respondent had no legal interest to challenge it; because, if it were set aside, the previous one of 1813 must come into operation. And,

3. That, in regard to the clause of revocation, the respondent was not entitled both to approbate and reprobate the deed; but that, at all events, such a clause was to be construed according to what was the manifest intention of the maker of the deed: that, if so, then the extent of its operation was to be governed by ascertaining what was the intention of the granter,

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‘ the person favoured by the liege poustie deed should in no event succeed. They thought that, although the fact of the two deeds being in favour of the same person was not conclusive, it was a circumstance of great weight in the *quæstio voluntatis*; and that, while a liege poustie deed in favour of a different person must be taken out of the way in order to make room for the person favoured in the deathbed deed; on the other hand, where the deathbed deed was in favour of the same person as the liege poustie deed, and merely conferred additional benefits upon him, the latter must be considered as still subsisting in favour of such person, and only altered to a particular effect, unless it was expressly revoked in *toto*.

‘ The Lord Justice-Clerk and Lord Craigie thought, that the heir's right of challenge being universal, and not being barred unless annihilated by a valid deed in liege poustie subsisting at the death of the ancestor, and the clause of revocation in this case being universal, unqualified, and unambiguous, his challenge was admitted. And they thought that it made no difference in such a case, that the disponees were the same. They thought that the case of *Coutts* was properly decided by the House of Peers.

‘ The Court being equally divided, Lord Cringletie, Ordinary in the Outer-House, was called upon to give his opinion. His Lordship thought that there was little doubt of the granter's intention, but that the Court could only look to the execution of intention; that the revocation of the liege poustie deed was general and unqualified; and that, when the language employed by a party was clear, the Court could not alter the deed which he had executed, merely on a conjecture of his intention.

and therefore a greater or less effect should be given to it, or it should be altogether suspended, according to the circumstances of the case: that in the present one it was manifest, that the deed was intended to be purely remedial, and was calculated for no other purpose than to give effect to that of 1813. They therefore maintained, that it was impossible to construe the clause of revocation so as to import that Mr Aitken intended, that if the deed of 1816 should not receive effect, that that of 1813 should be regarded as recalled. This doctrine, they alleged, was not contradicted by the case of *Coutts v. Crawford*; because, there, the disponent in the deed which was challenged was different from the person in whose favour the pre-existing deed had been granted; so that it could not be argued that it was the intention of the grantee, that if the last of the deeds were set aside, the prior one should revive: whereas, in the present case, the disponents in both deeds were the same, and consequently there could be no doubt as to the intention of the granter; and it had been decided in the case of *Whitelaw*, that, in such circumstances, the revocation of the prior deed was not to be presumed.\*

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\* The case of *Whitelaw*, 16th November 1809, is not reported; but as it was greatly relied on by the appellants, and contains an opinion of President Blair, their statement of it is given:—

‘ Thomas *Whitelaw*, in 1803, executed a Scotch trust-deed. The trustees inter alia were bound to pay L. 1000 to his widow, over and above her matrimonial provision; or, if she preferred it, to give her an heritable property, being a house in Glasgow; and also “to invest and secure the whole full remainder and residue of my fortune, means, and estate, (he had an heritable estate), for the life of my spouse, *Agnes Lang*.” After executing some other deeds, not necessary to be mentioned here, he went to Jamaica, and on deathbed made an English deed, in which he thus speaks of the Scottish deed now mentioned: “Whereas in the said will I appointed my said managers and executors to pay certain legacies and annuities; now, for certain weighty reasons, I totally revoke that will, and appoint of new my said wife my sole executrix and universal heir to the above narrated property,” together with what “I have or may recover in Jamaica.” Besides this specific revocation, he added another in the following terms: “I do hereby revoke, annul, and declare absolutely void and of no effect, the said last will and testament, and disposition of my estate and effects, to all intents and purposes.”

‘ In these circumstances the widow brought an action, in which she insisted that she was entitled to the full amount of the provisions settled upon her. Mr *Whitelaw*’s sisters, on the other hand, who were his heirs-at-law, brought an action, in which they insisted, 1st, That the previous settlement was extinguished by the revocation; 2dly, That the deed containing the revocation was ineffectual against them, not merely because it was in the English form, but because it had been executed on deathbed. Lord *Armadale*, the Ordinary, pronounced the following judgment: “Find, That the

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To this, it was answered by the respondent,—

1. That it is an established rule of the law of Scotland, that the proprietor of an estate is utterly disabled from exercising dispositive power while upon deathbed; and as Mr Aitken was

‘trust-disposition and settlement by Thomas Whitelaw, of date the 9th of December 1803, and supplementary deed of same date, were effectually revoked by the deed executed by the said Thomas Whitelaw in Jamaica in October 1805; but finds, That the said deed executed in October 1805 was ineffectual, as a deed on deathbed, and as a deed in testamentary form, to convey an heritable estate in Scotland; and therefore sustains the reasons of reduction in the action insisted on by Elizabeth and Jean Whitelaw, the heirs-at-law of Thomas Whitelaw; and to that extent also assolisies the said heirs-at-law from the counter-action at the instance of Agnes Lang, the widow of Thomas Whitelaw.” It appears from this, 1st, That deathbed was pleaded and decided; 2dly, and principally, That it was found that the last deed, though on deathbed, and in an English form, “effectually revoked” the previous settlement.

‘This interlocutor having been petitioned against, a hearing in presence took place. The Court was clear, and indeed had voted, that the revocation was valid; but the view of the matter which occurred was this: Let the second deed be held, as it must be held to be ineffectual; it is no matter whether this be done on the head of deathbed, or from defect of form, or from both; but let it be held as null; still we are of opinion, that it is good as a revocation. Now, in the ordinary case, there can be no doubt, that a revocation invalidates the deed revoked, though an intended new settlement should fail; because in the ordinary case, when a settlement is revoked, this is done from a change of disposition towards the persons who are favoured. But the peculiarity here is, that there is no room for supposing such a change of intention; for the deed revoking is rather more in favour of the original disponees than the deed revoked. In order to have a full discussion, memorials were ordered.

‘These memorials were occupied almost exclusively on this new aspect of the question. The light in which the matter appeared to the Court is fully disclosed in the notes, which were taken down at the moment by the reporter, from the speech of the late Lord President Blair, as follows:—“Thomas Whitelaw, proprietor of certain heritable subjects in the neighbourhood of Glasgow, and likewise of an estate in Jamaica, executed a disposition in the Scotch form, conveying his heritable properties therein described, and likewise all his other lands and moveables, to certain trustees, for payment of his debts, and other purposes; after which the deed proceeds,—“I appoint my trustee to vest and secure the whole free residue and remainder of my fortune, means, and estate, for the liferent use of my said spouse, Agnes Lang.”

‘“Of the same date he executed a last will and testament in the English form, for the purpose of recovering the effects in Jamaica, and vesting them in terms of the disposition. He afterwards executed a will in Jamaica in the English form, revoking the former deed and disposition, and appointing of new his said wife to be sole executrix and universal heiress to the above narrated property.

‘“He again executed another will, in English form, revoking all former wills. In this last will he declares all the residue and remainder of any estate, real, personal, or mixed, whatsoever, or wheresoever the same may be situated, I give, devise, and bequeath unto my said dear wife, Agnes Lang, to hold the same.

‘“An action had been brought at the instance of Agnes Lang, the widow, concluding to have it found and declared, 1st, That the testamentary deeds executed in Jamaica, in the English form, are effectual to convey the heritage situated in Scotland; or, 2dly, That she shall at least be found entitled to what is provided to her by the dis-

confessedly upon deathbed, the deed 1816 was ineffectual, so as to bar the right of the respondent as one of his heirs-portioners at law. And, March 1. 1824.

2. That as the deed 1813 expressly reserved a power to alter,

position and relative will of 9th December 1803. The Lord Ordinary has found that the settlements of 9th December 1803 were effectually revoked by the testamentary deed executed in Jamaica; and that these deeds being executed on deathbed, and in a testamentary form, are not effectual to convey heritage situated in Scotland, and therefore has preferred the heir-at-law.

"The merits of this case involve several questions of law, and depend materially on the validity and effect of the will executed by Mr Whitelaw in Jamaica, October 1805."

After various remarks on the other part of the case, his Lordship proceeded:—

"We must therefore come ultimately to the doctrine already considered, that, by the law of Scotland, deeds of revocation are exempted from the statutory solemnities; and I do not think this doctrine well founded.

"On the supposition, however, that the objections to the validity of the English will, considered as a revocation of the settlement of the Scotch estate, were to be overruled, two questions still remain:—The first relates to the construction of the deed, and whether the words of the revocation extend to the trust-deed in 1803? And, 2dly, What is the legal effect of such legal revocation?

"As to the first of these questions, I have little doubt a revocation requires no particular form of words, and it is only necessary that the will of the party be expressed with sufficient clearness to be understood; and the words used in this case will clearly shew that Mr Whitelaw had in view the revocation of the trust-deed: 2dly, As to the effect of the revocation, however, the question seems to me to be attended with more difficulty. A long argument has been maintained for Mrs Whitelaw to shew, that if the English will is not to have complete effect as a settlement, it cannot be sustained as a revocation. But this is very doubtful. A party may be desirous to revoke former deeds although new settlements should not stand. This is rather the legal presumption, and is recognized in the case of deathbed. The revocation may be separated from the rest of the settlement in which it is contained, and many instances have occurred in which a deed has been effectual as to one part of it, and ineffectual as to the rest.

"But the peculiarity in the present case which removes the legal presumption is, that, to a certain extent, the deed revoking and the deed revoked are in favour of the same person. The first deed gives the widow the liferent, and the second deed gives her the fee; and if the deed of revocation, while it deprives her of the liferent provided in the deed revoked, is at the same time ineffectual in the provision of the fee, she would thus be deprived of all those provisions which it was undoubtedly her husband's intention to confer upon her. It is impossible that a deed giving the fee can be construed to take away from her the liferent. This would be to allow one clause of a deed to defeat the express will declared in the same deed. If the first deed had been in favour of a different person, then there might have been some room for presumption that he meant at all events to recall that deed. But in this case there is no room for this presumption. The revocation is in fact a deed in favour of the widow. The express will of the testator is, that his widow shall at least enjoy the subjects during her life."

This principle was adopted by the Court, and the following interlocutor was pronounced:—"The Lords having advised the mutual memorials for the parties, and whole cause, they alter the interlocutor of the Lord Ordinary; repel the objections to the revocation contained in the deed executed in Jamaica in October 1805, in so far

March 1. 1824. even upon deathbed, and as that power had been exercised by the deed of 1816, that of 1813 was effectually set aside: in support of which it was maintained, that where a liege poustie deed reserves a faculty to revoke and alter, it may be exercised in lecto, in which case the revocation is equally effectual, whether it be expressed in a separate instrument by itself, or whether it form a clause of the dispositive deed or settlement objected to; so that the interest of the respondent could not be affected by the deed of 1813.

3. That approbate and reprobate is not a relevant objection against the heir *alioqui successurus*, who is entitled to found on the revocation as annulling the liege poustie deed, and at the same time to reduce the deathbed disposition as a deed granted to his prejudice: that the wishes or intention of the deceased to prefer a stranger donee to his heir, (in which situation the appellants stood in relation to the respondent's share), could neither support the deathbed deed directly, nor through the medium of the liege poustie deed, provided this last deed has been revoked expressly and unconditionally as a conveyance or disposition transmitting or affecting the property; a proposition which was established in the case of *Coutts v. Crawford*: And farther, that the identity either of interest or donees under the liege poustie and deathbed deeds, however clearly indicative of the predilection and intentions of the deceased, was a consideration of no relevancy in a question with the heir,—the liege poustie deed having been revoked, and the deathbed deed being subject to reduction: But that in the present case there was no identity of the two deeds, because that of 1816 was in many respects different from that of 1813.

The House of Lords 'ordered and adjudged that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

'as the same are founded upon the want of statutory solemnities; but find that the said deed is not an effectual revocation of the trust-disposition and settlement executed in 1803, in so far as Agnes Lang has interest therein. Therefore, assails her from the conclusions of the action of reduction at the instance of the Miss Whitelaws, and decree. And in the action of declarator at the instance of the said Agnes Lang, find and declare, that the trust-deed and settlement 1803 is a valid and effectual deed, so far as she can claim interest or provision thereby, and decern."

It is proper, however, to notice, that in a foot-note to the case of *Barclay v. Small*, 2d February 1815, F. C. it is stated, that the case of *Whitelaw* was not reported, because it was laid down by the Lord President, 'that the judgment went entirely upon specialties, and was not to be held as an authority.'

**LORD CHANCELLOR.**—Your Lordships have, within the last few days, heard a case in which the question to be decided is, Whether a will which was made by a gentleman of the name of Aitken, but which did not bear date sixty days before his death, was a valid disposition? or, on the other hand, whether it was an invalid disposition? it being contended, that though it might not be good as a disposition, it was good as a revocation of a former will. March 1. 1824.

My Lords, the nature of the case certainly is such, that one cannot help feeling it a case of considerable hardship on the appellant, Mrs Mudie; but after the greatest attention which I have felt it my duty to give to this case, in consideration of that circumstance, and also in consideration of the Division of the Court of Session, by whom this case was decided, having been divided in their opinion, it does appear to me, I own, to be impossible to advise your Lordships to reverse the judgment which has been given. There is this peculiarity in the law of Scotland, that though a deed is bad as a deathbed deed, it may be good for one purpose, that is to say, that the heir-at-law can insist that it is a good deed, provided the effect of it be to revoke a former settlement, though in itself it would be bad. In this case, it has been strongly contended at the Bar, that it ought not to operate as a revocation, although there are express words of revocation in it; and that it ought not to operate as a revocation, because there had been a former deed, and that it was an affirmance of that former deed. Now, in truth, in respect of that, there is hardly a single interest which is given in the former deed, which is not somehow, in its nature and quality, altered by this. It does, therefore, appear to me, that whatever might be the law,—in respect of which I beg I may be understood to give no opinion whatever, if the dispositions had been exactly the same,—I give no opinion whatever upon the principles which might or might not apply to such a case,—they do not apply to this case; and therefore, however much I may regret the hardship of the case, it appears to me your Lordships can give no other judgment but that of affirmance of this judgment.

*Appellant's Authorities.*—(1.)—2. Reg. Maj. c. 18. § 7, 8, 9.; 1. Craig, 12. 36.; 3. Stair, 4. 27.; 3. Mack. 8.; 3. Ersk. 8. 95.; Kames's Eluc. p. 162.—(2.)—3. Ersk. 8. 97.; Kames's Pr. of Eq. 1. 1. 4.; Whitelaw, Nov. 18. 1809, (not rep. but see Note, ante, p. 13.); Kerr, Jan. 25. 1677, (3249.); Hamilton, April 18. 1724, (Robertson's App. Ca. 674.); Irving, Nov. 1738, (3180.); Crawford, June 16. 1749, (16,121.); Rowand, Nov. 22. 1775, (11,371.); Telford, June 24. and July 8. 1806, (not rep.); Muir, June 1. 1813, (F. C. remitted).

*Respondent's Authorities.*—(1.)—3. Ersk. 8. 98.; Livingston, Jan. 23. 1708, (3273.); Cunningham, June 10. 1748, (16,119. affirmed, April 12. 1749.);\* 3. Ersk.

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\* It is stated in the appellant's case, 'That in the case of Donaldson v. Mackenzie, 20th July 1776, Lord President Dundas and Lord Covington (the latter of whom was one of the counsel in Cunningham's case) said from the Bench, that they knew the  
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March 1. 1824. Prin. 4. 9.; Campbell, Jan. 17. 1740, (6121.); Findlay, July 20. 1770, (3186.); Crawford, Nov. 17. 1795, as rev. March 14. 1806, (No. 3. App. Deathbed); Batley, Feb. 2. 1813, (F. C.)

J. CHALMER—J. CAMPBELL,—Solicitors.

(Ap. Ca. No. 4. and 5.)

No. 3. JAMES, DUKE OF ROXBURGHE, Appellant.—*Solicitor-General*  
*Wetherell—Mackenzie.*

A. SWINTON, W. S. Respondent.—*Warren—Adam.*

*Judicial Factor—Bona Fides.*—A judicial factor having been appointed on an estate pending a competition, and the widow of the last proprietor having worked quarries in her locality lands, and enjoyed the proceeds, and having been found not liable to repeat these proceeds, as having consumed them bona fide; and another party having, under a title ex facie good, drawn part of the rents of the estate, and been also found a bona fide possessor; and the judicial factor having been authorized to appoint sub-factors; and having paid a reasonable salary to a sub-factor; and (under the above exceptions) having uplifted the rents and feu-duties of the estate.—Held, 1. (affirming the judgment of the Court of Session), That he was not liable to account for the proceeds of the quarry and the rents, nor for the sum given as salary to the sub-factor. But, 2. (reversing the judgment), That he was bound to account for all the interest received by him on the rents and profits uplifted by him.

March 2. 1824.  
1st DIVISION.

ON the death of William, Duke of Roxburghe, a competition having arisen for his estates, the Court of Session, on the 17th December 1805, pending the discussion, found, ' that the Duchess- Dowager of Roxburghe is in hoc statu entitled to the possession

' history of the case very well. Before it came to be heard at the bar of the House of Lords, the parties understood that Lord Hardwicke, then Chancellor, thought that the interlocutor of the Court of Session was ill-founded; in consequence of which understanding, the matter was compromised by payment of a large sum of money. When the counsel were called to the bar, the cause was not argued, but it was stated that the matter was made up, and both parties concurred in wishing the decree to be affirmed; upon which Lord Hardwicke observed, " that the respondent had done wisely in not risking a judgment;" and then the interlocutor was of course affirmed. In the case of Crawfordland, Lord Justice-Clerk Braxfield said, that when the case of Cunningham<sup>14</sup> went to the House of Peers, it was understood that the Lord Chancellor held it to be a bad decision, and the matter was transacted, and a great sum of money paid to the disponent. I have always been of the opinion of the Lord Chancellor, that had it been brought to trial in the House of Peers, it must have been reversed; and it has ever since here been held as an erroneous decision." Lord Eskgrove said, " The case of Cunningham v. Whiteford always appeared to me a very extraordinary one; and to the decision which was pronounced by this Court I could have paid no regard." The respondent, however, stated that this rested upon no sufficient authority.

‘ of her locality lands, as contained in her marriage-contract and  
 ‘ infestment; sequestrated the whole other lands and estate of March 2. 1824.  
 ‘ the dukedom of Roxburghe, to which the late William, Duke  
 ‘ of Roxburghe, made up titles as heir of tailzie and provision,  
 ‘ in order that the same may remain in the hands of the Court  
 ‘ till the issue of the competition which has arisen among the  
 ‘ different parties claiming right to the said estate in consequence  
 ‘ of the death of the said late Duke; appointed Archibald Swin-  
 ‘ ton, writer to the signet, to be principal factor and receiver of  
 ‘ the rents of the said estate, with power to name sub-factors  
 ‘ under him, and with the other usual powers, he always finding  
 ‘ caution before extract, in terms of the Act of Sederunt.’

Among the lands, to the possession of which the Duchess of Roxburghe was entitled, were those of Sprouston and Broxmouth, in which there were quarries which had been worked by the Duke.

Certain other lands of the name of Burward and Wester-Grange, forming part of the Roxburghe estate, had been wad-settled by a former Duke; and in 1764 Duke John (the predecessor of Duke William) redeemed them, after which his Grace conveyed them to Mr Wauchope, W. S. as trustee, who, upon the death of Duke John in 1804, took possession of them, and continued that possession during the life of Duke William.

Mr Swinton accepted of the office of judicial factor at a salary of L.500 per annum; and he appointed as sub-factor a Mr Haldane, who had been employed as such by the late Duke, and who also acted as factor for the Duchess.

From 1805 to 1811 the Duchess worked the quarries, and through Mr Haldane received the proceeds; but in that latter year, it having been discovered by the appellant, (who was on the eve of ultimate success in the competition), that she had no right to do so, an action, on his suggestion, was brought by Mr Swinton against her, in which judgment was pronounced, finding that she had no right to work the quarries; but that she was a bona fide possessor, and therefore was not bound to repeat the bygone proceeds, amounting to about L.2500.

After the competition was terminated by a judgment in favour of the appellant, he farther discovered, that the lands which John Duke of Roxburghe had disposed to Mr Wauchope, formed part of the entailed estate; and having brought an action for repetition of the bygone rents which had been drawn by Mr Wauchope since the death of the Duke, he was assolizied as being a bona fide consumer.



March 2. 1824.

Pending the competition, large sums came into the hands of Mr Swinton, which he deposited in bank, with the exception of L.9200, which was lent upon heritable bonds to persons suggested by the agent of the appellant.

In the meanwhile the sequestration had been recalled, and an accounting having been gone into between the appellant and Mr Swinton, the former objected to the accounts of the latter:—

1. That as it was his duty to have protected the rights of all concerned pending the competition, he ought not to have allowed the Duchess to work the quarries, and therefore he was bound to charge himself with the L.2500 which she had been allowed to retain on the ground of bona fides.

2. That in like manner he ought to have investigated the titles, to ascertain what the lands were which fell under the entail, and consequently under the sequestration; but that by his failure to do so, the rents of the lands possessed by the trustee of Duke John had been lost, and therefore he was bound to charge himself with the amount.

3. That he was not entitled to take credit for the L.300 of salary to Mr Haldane the sub-factor, because it was his duty to have paid it out of his own salary. And,

4. That as there was no evidence that Mr Swinton had lodged the money received by him in bank, he was bound to account for the legal interest of it, with periodical accumulations, and, at all events, for that of the sums which had been lent on heritable bonds.

To this Mr Swinton answered,—

1. That as, by the warrant under which he had been appointed, the Duchess had been found entitled to possession of the lands of Sprouston and Broxmouth, whereby they were excluded from the sequestration, it was not incumbent on him to disturb that possession; and that he only did so at the requisition of the appellant, and for his behoof; and besides that, as she had been found to be in bona fide, there were no grounds for holding that Mr Swinton was in mala fide, or liable for these rents.

2. That as the sequestration was limited to the lands to which Duke William had made up titles, and as those possessed by the trustee did not fall within that description, he had no right to interfere; and besides, as it had been found that the appellant had no right to recover these rents from that trustee, so there was no principle upon which he could be entitled to restitution of them from Mr Swinton.

3. That power was granted to him to appoint sub-factors,

and the salary which had been given was perfectly reasonable. March 2. 1824.  
And,

4. That it was proved by bank receipts, that the money had been deposited in bank, with the exception already mentioned, for the legal interest of which he was willing to account.

The Court, on the report of an accountant, and on advising informations, ‘repelled the four objections stated by his Grace to Mr Swinton’s accounts, and reported upon by the accountant; and of new remitted to the accountant to proceed accordingly.’ And to this interlocutor they adhered, on the 23d of November 1819.\*

The Duke having appealed, the House of Lords ‘ordered and adjudged, That the interlocutors complained of, so far as the same repel the three first objections stated by the Duke of Roxburghe, (since deceased), be affirmed: And it is declared, That the said Archibald Swinton ought to account to the trustees and executors of the said Duke for all the interest made and received by him upon the rents, feu-duties, and profits of the said sequestrated estate, received by him as judicial factor: And it is therefore ordered and adjudged, That the said Archibald Swinton do account for the same accordingly: And it is further ordered and adjudged, That the said interlocutors, so far as the same are inconsistent with this declaration, be reversed: And it is further ordered, That the said cause be remitted back to the Court of Session, to do therein as shall be just.’

LORD GIFFORD.—My Lords, in the case in which the Duke of Roxburghe is appellant, and Archibald Swinton, writer to the signet, is the respondent, which was heard before your Lordships a few days ago, I will now take the liberty to offer to your Lordships my opinion.

It appears, that during the competition for the Roxburghe estates, the respondent, Mr Archibald Swinton, was appointed, by interlocutor of the 19th December 1805, principal factor and receiver of the rents of the estate which the Court of Session had sequestrated. The interlocutor finds, ‘that the Duchess,’ &c.

My Lords, after that competition had ended, the respondent, Mr Swinton, had to render his accounts, and they were accordingly remitted to an accountant, who, after having examined them, made a report to the Court of Session, in which he stated, that several objections had been made by the Duke of Roxburghe to the account so rendered by Mr Swinton; first, as to the quarry rents of the estate, both of Sprou-

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\* Not reported.

March 2. 1824. ton and Broxmouth; and he stated, that these quarries were upon the locality lands of the Dowager Duchess, and appear to have been considered by the factor as falling under her locality till 1811, when an action was commenced against her Grace, in which it was found, that her Grace had no right under her locality to work these quarries; but the Court ultimately found the Duchess entitled to retain the bygone proceeds thereof, as bona fide consumpti. The Duke of Roxburghe alleges that, in consequence of the negligence of the factor from 1805 to 1811, he sustained a loss to the amount of above L.2500, which he considers entitled him to insist should be made up to him by the factor, who ought to be charged with the proceeds of these quarries from the commencement of his factory, so long as the same were drawn by the Dowager Duchess.

The Duke then made another objection with respect to certain rents of a property called Wester-Grange; and the accountant reported, that 'those lands had been wadsetted by the family at an early period, but were redeemed by Duke John in 1764, and an absolute discharge and renunciation of the wadset taken, by which it was fully extinguished, and the lands free and disburdened came to be possessed under the entails. Notwithstanding of this, Duke John's trustee, Mr Wauchope, was allowed to possess these lands, and draw the rents thereof: the lands are said to have yielded a rent of L.212 at the commencement of the factory, and to have since considerably increased; all of which were paid over to Mr Wauchope, in place of being accounted for by the factor; and the Duke of Roxburghe contends, that he is entitled to insist that these be annually charged against Mr Swinton with the other rents of the estate.'

The third objection was to the sub-factor's fee. It appears that Mr Swinton had appointed Mr Haldane his sub-factor, and had allowed him L.300 a-year: the Duke contended that he ought not to be allowed that sum.

Then there was another objection in respect of interest. 'Mr Swinton considers that he was not to be charged with interest upon his accounts according to the general mode of accounting of judicial factors; and states, that as it was supposed the competition for the Roxburghe estate would not be of long continuance, it was therefore understood, at the time of his appointment, that the rents were not to be lent out upon permanent securities bearing the legal interest, but were to be deposited in a bank.' The Duke contended, therefore, that Mr Swinton must charge himself with bank interest on every sum of interest.

My Lords, on these objections thus reported coming before the Court of Session, the Court, on the 25th February 1819, pronounced this interlocutor:—'The Lords having advised this information for Archibald Swinton, with the counter-information for his Grace the Duke of Roxburghe, they repel all the four objections stated by his Grace to Mr Swinton's accounts, and reported upon by the accoun-

‘taut; and of new remit to the accountant to proceed accordingly.’ March 2. 1894.  
 Against this interlocutor there was a reclaiming petition; and their Lordships, on the 28d November 1819, ‘having resumed consideration of this petition, and advised the same with the answers given in there-  
 ‘to, they refuse the desire of the petition, and adhere to the interlocu-  
 ‘tor reclaimed against.’ The result was, that the Court of Session dis-  
 allowed all those four objections made by the Duke of Roxburghe to Mr Swinton’s accounts. My Lords, against these interlocutors an appeal has been brought before your Lordships’ House; and with re-  
 spect to the two first objections, those relating to the quarry rents of the estate, and the rent of this estate of Wester-Grange, I would state to your Lordships that the quarries are situated in the lands of Sprouston and Broxmouth, which were part of the locality lands of the Duchess. She worked those quarries until the year 1811, and was permitted to receive the profits; but at that time it was thought she had no right whatever to the profits of those quarries, and a suit was instituted against her, the result of which was, that from that period those profits were adjudged to belong to the Duke of Roxburghe; but it was found by the Court of Session, ‘that she was not bound to repay bygone  
 ‘profits, because it was held that she had acted optima fide in uplifting  
 ‘the rents and profits of all these subjects, and that she enjoyed the  
 ‘same for several years without the slightest interruption or challenge.’ My Lords, the effect of that judgment appears to me to have been, that it was thought by the Court of Session, that though the Duchess of Roxburghe was not the true proprietor of those quarries, and therefore justly entitled to those profits, there was probable ground at least for her continuing in possession, and that upon that ground she was not bound to repay this rent. Now, under these circumstances, it appears to me that it would not be just to say, that the judicial factor is to account to the Duke of Roxburghe for these profits. It appears that a suit was instituted against her, and that certainly the opinion of the Court of Session was, that there was a probable ground for her retaining possession, and therefore that she was not bound to repay those profits. It seems to me, therefore, that the Court of Session have done right in saying, that the factor has not done any thing to make him liable for those profits, which they had held the Duchess not liable to repay. With respect to the estate of Wester-Grange, the case is still stronger: for though undoubtedly that estate was part of the lands in right of which, and upon which, the Duke of Roxburghe had made up titles, it appears that Mr Wauchope, the trustee, had been permitted in the lifetime of the late Duke to retain possession of the lands, and that he continued in possession during the sequestration. It appears that, strictly speaking, they were part of the entailed lands; but it was the intention of the Duke to have taken them out of the entail if he could have done so: he conveyed them in trust, and, in consequence, they remained in possession of Duke John’s trustees until the sequestration was recalled. It was there again held, although Duke

March 2. 1824. John's trustee was not entitled to those lands, yet he had held them on the probable ground of title, and that, therefore, he was not subject to pay the bygone rents to Duke James. Now it appears to me, that it is a stronger case than the other. It was contended in the Court below, that the judicial factor was bound to institute a suit to recover these lands, although at that time they were possessed by another person, they being held, as it is alleged, under a fraudulent ground of title. It appears to me, therefore, that the Court of Session have determined right in repelling that objection also.

The third objection related to the limited fee paid by the judicial factor and receiver of the rents of the estate, who, with a power to name sub-factors, had allowed Mr Haldane L.300 a-year during the time these estates were under sequestration. It is not contended at the Bar that it was an exorbitant sum paid to Mr Haldane, but they rely on a letter of Mr Swinton, after the discussion had taken place, from which they infer that he might have obtained the services of Mr Haldane at a less rate; but, inasmuch as the Court of Session held that he was entitled to have the nomination of his sub-factor, and there is no pretension at the Bar that this was an unreasonable sum, it appears to me that the Court of Session have done right in repelling that objection.

The question, however, of the interest, stands on a very different ground. Mr Swinton contends, that it was understood at the time he was appointed, that he should have only a limited sum paid him, and that he should not be paid at the usual rate of factor; that at that time it was thought that the competition for the succession would not be of long endurance, and that therefore the rents were not to be lent out on permanent securities, bearing the legal interest, but were to be deposited in a bank ready to be paid up to the successful candidate, as soon as the competition should be over,—an event which, it is stated, was looked for every Session of Parliament from year to year for the last five years that the respondent held the office. In particular, he states, that that was his Grace's understanding, and that he availed himself of it, which can, if necessary, be shewn in the most satisfactory manner; and therefore he contends, that it would be too much for the Duke now to say, that he was liable for interest at a rate which he never received; and that, although that was understood at the time, and he had confided in that understanding, he may now come upon him for such interest as might have been made, if otherwise employed. But, my Lords, Mr Swinton himself admits, that a very considerable sum of money had not been deposited in the bank, but had been lent out on permanent securities, and had produced more than the interest which he allowed by a sum of L.318, which he offers to account for, and which it appears to me strange the Court of Session have taken no notice of. I do not find in the Judges' notes that that was brought before the Court; but in the manner in which it was stated at the Bar of this House, it was admitted by the Counsel for Mr Swinton, that it

was impossible to contend that he was not subject to that sum, nor did they seem very strenuously to resist that they were bound to account for all the interest that this factor had really made of this sequestrated property; for, undoubtedly, it cannot be contended that he was entitled to any additional profit arising out of this administration, he being allowed a very handsome salary for the administration of this estate. The Duke contends, that he is either to account for the interest he has made, or that he ought to be charged the legal interest; and it is agreed by the Counsel for the appellant, that if he will consent to account for the profits he has made, they shall be satisfied. It appears to me, therefore, with respect to the fourth objection repelled by the Court of Session, that it ought to be allowed, and that the case ought to go back, in order that an inquiry may be made as to the real interest this gentleman has made of the sequestrated estate. And I should propose, therefore, that your Lordships should order that the interlocutors complained of, so far as the same repel the three first objections stated by his Grace the Duke of Roxburghe, should be affirmed; but that it should be declared by this House, that the said Archibald Swinton ought to account to the trustees and executors of the said Duke for all the interest made and received by him upon the rents, feu-duties, and profits of the said sequestrated estate received and to be accounted for by him as judicial factor. And that the several interlocutors, so far as the same are inconsistent with that declaration, be reversed, and that the cause be remitted back to the Court of Session in Scotland, to do that which is consistent with this finding.

March 2. 1824.

SPOTTISWOODE and ROBERTSON—A. MUNDELL,—Solicitors.

(*Ap. Ca. No. 6.*)

YOUNG, ROSS, RICHARDSON and Company, Appellants.

*Adam—John Campbell.*

No. 4.

WILLIAM MUIR, Trustee of JAMES AUCHIE and Company,  
Respondent,—*Stephen—Whigham.*

*Bankrupt—Statute 54. Geo. III. c. 137.—Repetition—Proof.*—A creditor of a Company under sequestration having adopted legal proceedings for recovery of his debt against one of the partners in Jamaica, (whose estate had not been sequestrated); and the Provost Marshall of the island having incurred a liability for the debt, by suffering the partner to escape, and having paid the debt; and the trustee on the estate of the Company having brought an action against the creditor for repetition of the money, alleging that the debt was paid out of the proceeds of the Company's estate delivered to the Provost Marshall; and having produced a correspondence between himself and his attorney to prove that fact.—Held, 1. (reversing the judgment of the Court of Session), That the creditor was not bound to repeat; and, 2. That the correspondence was evidence against, but not in favour of, the trustee.

March 2, 1894.

1st Division.  
Lord Alloway.

JAMES AUCHIE, John Auchie, and William Dollar, carried on trade as partners in Glasgow, under the firm of James Auchie and Company; and in Jamaica, under that of Dollar, Auchie and Company. William Dollar resided in Jamaica, and managed the business of the partnership there.

On the 25th of July 1812, a sequestration under the Bankrupt Act was awarded by the Court of Session of the estates of James Auchie and Company, and of Dollar, Auchie and Company, and of John Auchie and James Auchie, two of the three partners, as individuals. On these estates Muir was appointed trustee. The private estate, however, of William Dollar was not included in the sequestration, because he had never resided in Scotland since he became a trader, and he had never carried on business there as an individual.

At this time the appellants, Young, Ross, Richardson and Company, printers at Ruthven-field, near Perth, were creditors of the Company, (and consequently of each of the individual partners), by bills granted by the Company for L.1844. 14s. 6d. Having received information that William Dollar had private property in Jamaica, they indorsed the bills to a Mr Auchinvole residing there, who raised an action in the Courts of that island against the three partners, (all of whom it was necessary, in point of form, to call as parties), with the view of attaching the estate of William Dollar; and on the death of Auchinvole, it was insisted in by Alexander Woodburn.

The appellants then caused intimation to be made to the Provost Marshall of Jamaica, not to permit William Dollar to leave the island. He was, however, allowed to do so; and having proceeded to Cadiz, he there met with his partner and uncle, James Auchie, with whom he entered into an arrangement, by which he addressed a letter to certain gentlemen in Jamaica, as his attornies, authorizing them 'to deliver or hold at the disposition of Mr William Muir, trustee, and the commissioners on the estate of James Auchie and Company, and Dollar, Auchie and Company, the whole property, debts, &c. and every thing belonging to the said estate, or me as an individual.' In consideration of this letter, Muir, by his attornies, Bogle and Scott, granted a bond, which (after reciting the proceedings of the appellants) was in these terms:—'Whereas the said Andrew Bogle and Michael Scott, as attornies aforesaid, have consented, at the request and on the requisition of the persons acting in this island for the said William Dollar, to indemnify the said William Dollar against the said claims of

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‘ Messrs Young, Ross, Richardson and Company, or of the afore-  
 ‘ said Fulton Auchinvole, and against all costs and charges incur-  
 ‘ red, or to be incurred in defending the same, or relating there-  
 ‘ to, on the persons in this island acting for the said William  
 ‘ Dollar delivering over to the said Andrew Bogle and Michael  
 ‘ Scott all the estate and effects whatsoever of the said Companies,  
 ‘ or of the said William Dollar individually, under their controul,  
 ‘ in behalf of the said William Dollar: Now, the condition of  
 ‘ the above written obligation is such, that if the said Andrew  
 ‘ Bogle and Michael Scott, their heirs, executors, and adminis-  
 ‘ trators, some or one of them, do and shall at all times hereafter  
 ‘ well and truly save, defend, keep harmless and indemnified, the  
 ‘ said William Dollar, his heirs, executors, and administrators,  
 ‘ and his and their lands, tenements, and hereditaments, goods,  
 ‘ chattels, and effects, of, from, and against the aforesaid claim  
 ‘ and demand of the said Messrs Young, Ross, Richardson and  
 ‘ Company, or of the said Fulton Auchinvole, and of, from,  
 ‘ and against the said actions so instituted therein and depend-  
 ‘ ing as aforesaid, and all or any action, actions, or process  
 ‘ whatever, hereafter to be commenced, sued, or taken out in  
 ‘ respect thereof; and all costs, charges, damages, and expenses  
 ‘ already or hereafter to be incurred or sustained by the said  
 ‘ William Dollar, his executors or administrators, for or in  
 ‘ respect thereof, or in anywise relating thereto; then the above  
 ‘ written obligation to be void and of no effect; or else to re-  
 ‘ main and be in full force and virtue.’

Under this arrangement, Bogle and Scott, as the attornies of Muir, received possession of the whole effects belonging to the Companies and to William Dollar. Soon thereafter the appellants got judgment for L. 3644. 2s. 1d. currency, and obtained writs of execution, directed to the Provost Marshall, to levy the amount out of the ‘ goods and chattels, real and personal, of John Auchie and James Auchie, of that part of the united kingdom, &c., and ‘ William Dollar, late of the city and parish of Kingston, but at ‘ present an absentee from the island, merchants and copartners ‘ lately trading in Great Britain under the firm of James Auchie ‘ and Company, and in the said city and parish of Kingston under ‘ the firm of Dollar, Auchie and Company.’ In consequence, however, of the Provost Marshall having incurred a liability for the debt, by suffering William Dollar to leave the island, the appellants claimed and recovered the amount from him. In point of fact, the money was put by the attornies of Muir into the



March 2. 1824. hands of the Provost Marshall, who granted a receipt to them for the amount on the back of the writ of execution.

Thereafter Muir, founding on the 51st section of the Bankrupt Act, declaring, that 'in case any creditor shall, after the first deliverance on the petition for sequestration, obtain any legal or voluntary preference or payment on or out of any estate or subject belonging to the bankrupt, directly or indirectly, situated without the jurisdiction of the Court, he shall be obliged to communicate and assign the same to the trustee, for behoof of the creditors,' &c.; and alleging that the appellants had, by their proceedings in Jamaica, recovered payment out of the estate of the bankrupts, he brought an action against them in the Court of Session, concluding for repetition of the amount.

In support of this claim, he produced a great deal of correspondence between himself and his attornies, with a view to shew that the whole effects situated in Jamaica belonged to the Company and not to Dollar, and that the debt had been paid from that source.

In defence, the appellants maintained,—

1. That as the Provost Marshall had incurred a liability to them for the debt, and as they had received payment from him in virtue of that liability, it could not be held that they had recovered payment out of the Company estate; and that if the attornies of Muir advanced or lent to him the amount, or gave it to him under the arrangement with William Dollar, the appellants could not be affected by that circumstance. And,

2. That it was proved by William Dollar's own letter, and by the correspondence produced, that he possessed private property, and that it had been transferred to the attornies of Muir, under an obligation to relieve him of payment of the debt, whereby Muir was in fact substituted in the place of Dollar.

The Lord Ordinary found, 'That it is sufficiently instructed by the documents produced by the pursuer, that the sequestrated estate of Dollar, Auchie and Company, was debited with the payments made to the defender, and that the defenders have not sufficiently instructed, that the funds from which they received their payment belonged to the individual estate of Dollar, and not to the funds of the Company; therefore, as this is a preference which they have obtained over the other creditors, repels the defence, and decerns in terms of the libel.' And on the 5th of March 1818 he adhered, 'for the reasons already stated, and in respect that the debt which was recovered by

'the legal procedure in Jamaica, was a Company debt of Dollar, March 2. 1824.  
'Auchie and Company, contracted in this country, and for which  
'Dollar could be liable as a partner of that Company; and the  
'production in process instructs, that the funds of the Company  
'were applied to the payment of this debt.'

To these interlocutors the Court adhered on the 17th December 1818, and refused a petition without answers on the 22d January 1819.\*

Young, Ross, Richardson and Company having appealed, the House of Lords found, 'That there is no evidence that the appellants obtained any payment of the sum of L.3644. 2s. 1d. Jamaica currency, in the pleadings mentioned, out of any estate or subject belonging to the bankrupts, in the pleadings named, directly or indirectly; and that, on the contrary, it appears, by the documents produced by the respondents, and referred to in the interlocutor of the Lord Ordinary of the 5th of March 1818, (which, although not evidence to affect the appellants, are evidence against the respondents as produced by them), that all the effects of the bankrupts in partnership, and also all the separate property of William Dollar in the island of Jamaica, were possessed by the agents of the respondents in the said island, and that the produce thereof had been remitted to the respondents, or remained in the hands of their agents, at the time when the appellants are alleged to have received, by their agent, from the Provost Marshall of the island of Jamaica, the said sum of L.3644. 2s. 1d. Jamaica currency; and it therefore appears, from documents produced by the respondents, that the appellants could not have obtained payment of the said sum of L.3644. 2s. 1d. by levy of the same, under the judgments in the pleadings mentioned, out of the effects of the partnership; and there is no evidence that the appellants received the said sum of L.3644. 2s. 1d. in any manner, except, as the appellants have admitted, that the same was received by their agent from the Provost Marshall of the island of Jamaica, in consequence of his neglect of duty, for which he was personally responsible. And it is therefore ordered and adjudged, that the several interlocutors complained of be reversed; and that the defenders in the said action be assoilzied.'

J. CHALMER—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No. 7.*)

## No. 5.

WILLIAM TAYLOR, Appellant.—*Brougham*.JAMES KERR, Respondent.—*Jameson*.

*Bankrupt—Sequestration*.—An appeal dismissed against an order in a sequestration for choosing commissioners, after an appeal entered against a judgment awarding sequestration, which had in the meanwhile been affirmed.

March 9. 1824.

1st DIVISION.

THE Court of Session having sequestered the estate of the appellant, as falling under the Bankrupt Act, he entered an appeal to the House of Lords; and the respondent, Kerr, having thereafter been appointed trustee, the Court authorized him to take possession of the estates in the meanwhile, in terms of the Bankrupt Statute, and granted warrant for holding a meeting of creditors to elect commissioners.\* Against this order the appellant entered another appeal, on the ground that, pending the other appeal, it ought not to be enforced. That appeal, however, was dismissed on the 26th of July 1822, (see ante, Vol. I. p. 254.); and in this appeal the House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutor complained of affirmed, with L. 50 costs.'

DUTHIE—THOMAS,—Solicitors.

(Ap. Ca. No. 9.)

## No. 6.

WILLIAM TAYLOR, Appellant.—*Brougham*.Colonel JOHN BOYLE, Respondent.—*Warren—Cameron*.

*Landlord and Tenant—Irritancy*.—Circumstances in which a judgment of the Court of Session, refusing a bill of suspension of a decree of irritancy of a lease by a Sheriff, was affirmed.

March 9. 1824.

2d DIVISION.  
Bill-Chamber.  
Lord Meadowbank.

IN the month of December 1814, Taylor obtained a lease for thirty years, from Whitsunday 1815, of the colliery of Shew-alton, from the proprietor, Colonel Boyle, at the rent of L. 150 for the first year, and L. 300 for every subsequent year. By this lease it was stipulated, that 'in the event of bankruptcy, or of a sequestration being awarded against the said William Taylor, or any of his heirs succeeding to the lease, the said Colonel John Boyle, and his foresaids, shall be entitled to enter into possession of the premises at the first term of Whitsunday or Martinmas thereafter, as if the lease had come to an end.' There-

\* Not reported.

after Colonel Boyle let to him a lease of a steam-engine and railway, for the same period, at the rent of L.190, payable at four terms in the year, and in which it was agreed, 'that in case the said William Taylor shall at any time allow three quarters' rent to remain in arrear unpaid, then this tack shall be irritated and forfeited; and it shall be in the power of the said Colonel John Boyle immediately to remove the said William Taylor from the possession. And in regard that it has been agreed that the foresaid engine and railway shall be possessed along with the coal, so it is likewise agreed upon, that the foresaid tack of the coal shall not subsist longer than these presents; and that if the one tack shall from any cause terminate before the expiry of the said thirty years, so shall the other, and a decreet of removing from the one shall imply a decreet of removing from the other; so that if the said William Taylor, by allowing his rent to run in arrear, shall forfeit this tack, and be removed from the engine and railway, then he also obliges himself and his fore-saids at the same time to remove from the coal-work.'

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Soon thereafter Taylor got involved in pecuniary difficulties, diligence was raised against him, and measures were adopted for having his estates sequestrated under the Bankrupt Act; when, on the 5th of August 1816, he executed a disposition omnium bonorum to trustees for his creditors. Under this title they took possession of the colliery, &c.; but, on the 16th of April 1818, they intimated to Colonel Boyle, under form of protest, that they intended to abandon it on the 14th of May thereafter. At this time there was an arrear of rent due to Colonel Boyle, which he alleged amounted to L.568. Having then applied to the Sheriff of Ayrshire, he obtained a warrant of sequestration of the stocking, and thereafter a warrant of sale; under which he realized L.200, leaving a balance due to him of L.368. After the abandonment of the trustees he resumed possession, and raised a summons before the Sheriff against Taylor and the trustees, libelling on the two leases, setting forth that there was a large arrear due, and that Taylor was bankrupt, and concluding for decree, 'finding and declaring that the fore-said leases are irritated, and that the same expired and came to an end on the said 14th day of May last, and that the pursuer has been legally in possession thereof since that date, and that neither the said trustees, nor the said William Taylor, have now any right or title to the said leases, or to interfere with or to interrupt the pursuer in the possession thereof; and in the event of their so interfering, they ought to be summarily

March 9. 1824. 'ejected therefrom, and decerned and ordained, by decree fore-  
'said, to flit and remove themselves, their families, goods, and gear,  
'from the said subjects, and leave the same void and redd, and  
'cease to molest and trouble the pursuer in the possession thereof.' In this summons, however, he did not expressly libel the conventional irritancy, in the event of an arrear of rent, nor specify what that arrear was. On being served with this summons Taylor intimated his intention to resume possession, whereupon Colonel Boyle presented a petition for interdict till the issue of the cause, which was granted.

On advising the proceedings in this action, the Sheriff-substitute pronounced this interlocutor:—'Finds, that by the tack of  
'the coalwork produced, it is declared, that in the event of bank-  
'ruptcy, or of a sequestration being awarded against the defender,  
'William Taylor, or any of his heirs succeeding to the lease, then  
'the pursuer and his foresaids should be entitled to the posses-  
'sion of the premises at the first term of Whitsunday or Martin-  
'mas, or at any term of Whitsunday or Martinmas thereafter,  
'as if the lease had come to an end; and by the subsequent tack  
'of the engine or railway it is declared, that, in order to secure  
'the punctual payment of the rent, it is hereby stipulated and  
'agreed upon, that in case the said defender should at any time  
'allow three quarters' rent to remain in arrear unpaid, then the  
'said tack should be irritated and forfeited, and it should be in  
'the power of the pursuer to remove the defender from the pos-  
'session; and it was also agreed, that the foresaid engine and  
'railway should be possessed along with the coal as therein men-  
'tioned, and that this last tack should not subsist longer than the  
'first tack, and that if the one tack should from any cause ter-  
'minate, so should the other, and a decree of removing from the  
'one should imply a decree of removing from the other; and if  
'the defender, by allowing his rent to run in arrear, should for-  
'feit this last tack, and be removed from the engine and railway,  
'then he also obliged himself and his foresaids at the same time  
'to remove from the coalwork: Finds it admitted, that the affairs  
'of the defender, William Taylor, were in confusion and dis-  
'order: Finds, that a sequestration of his estate was applied for  
'on 12th July 1816, and which was afterwards abandoned, and  
'the defender granted a trust-deed of his whole estate to the  
'other defenders, his trustees, for the special purposes therein  
'mentioned: Finds, that these trustees managed and wrought  
'the coalworks, &c. until the 14th of May last, when they found  
'the same unprofitable and disadvantageous, and by the direc-

‘ tions of a general meeting of the creditors, they abandoned the  
 ‘ same, agreeable to notarial intimation of date the 16th of April  
 ‘ last: Finds, from the stated account, No. 8. of process, betwixt  
 ‘ the pursuer’s factor and the doer for the trustees, a balance of  
 ‘ rent, &c. is due the pursuer, amounting to L. 568. 19s. 9½d.  
 ‘ Sterling: Finds, that the defender, William Taylor, does not  
 ‘ allege that he has got his affairs extricated from the confusion  
 ‘ they were originally involved in: Finds, under the whole cir-  
 ‘ cumstances of this case, that he had no right to reassume the  
 ‘ possession of the premises, without at least paying up the arrears  
 ‘ of rent confessedly due, and thereby purging the irritancy.  
 ‘ Before advising, ordains him immediately to do so, and assigns  
 ‘ this day ten days for that purpose, with certification.’

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This judgment was adhered to by the Sheriff-depute, who gave this opinion in reference to an objection stated to the competency of the action:—‘ In the case, 2d of June 1812, Forbes v. Duncan, it was found, that an irritancy on a tenant’s bankruptcy might be declared in the ordinary form of a removing before the Sheriff, without any previous action of declarator. In that of 7th of December 1805, Gordon v. Copland, there referred to, it was further found, that such an irritancy was not purgeable by the supervening solvency of the tenant before decree of removing was pronounced; and the same principle was recognized in the case of 16th of June 1812, Kinloch v. Macomie. Here, besides the general ground of bankruptcy, there is a farther irritancy declared on the incurring three quarters of a year’s arrear; and it seems pretty clearly established that more than this is incurred. All the length which the present interlocutor goes, is to ordain the arrear to be paid up, on failure whereof the irritancy must be declared, and decree of removing pronounced. Even were this arrear paid up, it may be a farther question, whether an irritancy has been incurred on the ground of bankruptcy or otherwise; though it may be doubted whether the conveyance to trustees, and renunciation by them, would be sufficient per se to vacate the lease, supposing the tenant could now prove his solvency. As to the question of possession, that falls more properly under the process of interdict remitted hereto. But it appears that the trustees renounced possession on the 14th of May. The whole stock and machinery were sold under the authority of the Court, and bought by the landlord. Nobody appears to have taken possession for the tenant, (his letter threatening to resume possession not being dated till 11th of

March 9. 1824. ' July, near two months thereafter). In all these circumstances, the landlord might fairly presume desertion by the tenant, and take possession himself; and this possession, it is thought, cannot be interrupted till the tenant shews his title to resume the lease. As to the tenant's argument on the Act of Sederunt 1756, it seems to make against himself; for the case of 15th of December 1767, *Wauchope v. Hope*, only shews, that in collieries the landlord is dispensed from the regular forms of removing under the Act, and may obtain decret against the tenant on any reasonable grounds; and to the same purpose, *Erskine*, b. ii. t. 6. § 49.'

Against these judgments Taylor presented a bill of advocacy, which Lord Cringletie refused, for the reasons explained in the following note:—' The Lord Ordinary having advised this bill with the process,—and although he thinks that the bankruptcy alluded to in both the leases granted to the complainant by Colonel Boyle, was a real bona fide insolvency of the tenant, although he might not be a notour bankrupt in terms of the statutory law; as for instance, that the tenant should be forced to grant a disposition omnium bonorum to trustees, for behoof of the creditors, whereby he would become quite unable to perform his part of the lease, as happened to the complainant; yet the Lord Ordinary does not think it necessary to take bankruptcy into view, as a substantive ground of removing in this case. There were two leases granted to the complainant, the latest of which in date is that of the engine and railway, and in it the rent is L. 190; and in the tack there is a clause declaring, that if the said William Taylor shall at any time allow three quarters' rent to remain in arrear unpaid, then this tack shall be irritated and forfeited, and it shall be in the power of the said Colonel John Boyle to remove the said William Taylor from the possession.

' It is then declared, " that a removing from the subject let by the one tack shall imply a decree of removing from the other, so that if the said William Taylor, by allowing his rent to run in arrear, shall forfeit this tack, and be removed from the engine and railway, then he also obliges himself and his foresside at the same time to remove from the coalwork."

' From these clauses it is as clear as any proposition can be, that it does not require Mr Taylor to be three quarters of a year in arrear of rent for both the coal and engine before Colonel Boyle is entitled to remove him. But, on the contrary, that if Mr Taylor were in arrear for rent of three terms for the engine alone, he might be removed from both the subjects.'

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' Mr Taylor became insolvent, and conveyed his leases to trustees, whose management the Colonel permitted, and they gave him notice that they were to abandon, and did actually abandon the subjects at Whitsunday last 1818; and it is not disputed that Colonel Boyle did then assume possession, in which he continued quietly till 7th of July following. At that term the rents had been unpaid, and an arrear was due, as Colonel Boyle says, of L. 568. 18s. 9d., which is more than a year's rent of both the subjects, and even according to Mr Taylor's own statement, there was an arrear of L. 844, which is nearly two years' rent of the engine and railway. Had then Mr Taylor been in possession at Whitsunday 1818, Colonel Boyle could have brought a removing against him before the Sheriff from both the subjects, because he owed much more than three terms' rent of the engine, and a removing from that inferred also a removing from the coal. But Mr Taylor was not in possession, for it had been ceded by the trustees, who were in the lawful possession, and it was assumed by the Colonel, who therefore was not obliged to raise the removing in order to obtain possession, which otherwise would have been necessary. When, however, Mr Taylor began to be serious in attempting to reassume possession, the Colonel raised his action before the Sheriff, which, proceeding on the authority of 2d of June 1812, Forbes v. Duncan, by which it was found in this Court that a conventional irritancy in a lease might be enforced without a declarator of irritancy; the summons concludes, that the pursuer, Colonel Boyle, being in possession, and the leases irritated, so, in the event of their (viz. Mr Taylor or his trustees) interfering, they ought to be summarily ejected therefrom, and decerned and ordained by decree foresaid instantly to flit and remove themselves, their families, &c. The declaratory part of the summons is only with the view of introducing the conclusion for the removing, which could not well have been libelled without it, and in terms of the case of Forbes is competent before the Sheriff.

' It is admitted, that the Sheriff has not rested his judgment on the circumstance alone of the complainer's insolvency, but, on the whole case, he has placed it on the ground of the complainer's being in arrear of more than three terms' rent; and it is quite enough to support that judgment if the complainer be in arrear only for the engine, which cannot be disputed. But the Lord Ordinary believes that the arrear extends to greatly more; because, by a docketed account, the trustees have con-



March 9. 1894. 'fessed an arrear at Whitsunday 1818, of no less than L. 568. 16s. 9d. Viewing the case then as an irritancy, the Sheriff has considered it to be purgeable, and allowed it to be purged, so that his interlocutor appears to be perfectly well founded; and in these circumstances it is impossible for the Lord Ordinary to listen for a moment to the prayer of this bill, which prays him to pass it without caution. As to the Act of Sederunt 1756, the Sheriff has not proceeded on it at all; for if he had, he would have ordained the complainer to find caution for the arrears, and five subsequent crops, which he has not done. He has proceeded on the conventional irritancy, and considered the insolvency and dereliction of possession merely as circumstances.'

To this judgment the Second Division adhered on the 11th of February 1819.\*

The case then returned to the Sheriff Court; and the estates of Taylor having been in the meanwhile sequestrated under the Bankrupt Act, and Kerr appointed trustee, Colonel Boyle called him as a party by a supplementary summons. The arrears not having been paid up, the Sheriff decerned in terms of the libel; and the decree having been extracted, Taylor presented a bill of suspension, which Lord Meadowbank refused, and the Court adhered on the 13th November 1819.\* Against these judgments in the suspension (but not those in the advocacy) Taylor entered an appeal, on the ground chiefly,—

1. That it was not competent for the Sheriff to declare the lease forfeited, but that this could be done by the Court of Session only. And,

2. That the summons did not libel on the conventional irritancy which formed the ground of judgment, and therefore that the judgment was inept.

To this it was answered,—

1. That the competency of the Sheriff to enforce a conventional irritancy in a lease, had been repeatedly decided in the affirmative, and that it had been so in this case by the judgments in the advocacy, which were not appealed against. And,

2. That the leases had been libelled on, and an arrear averred and condescended on; and as an ample opportunity had been given to pay it up, and this had not been done, the Sheriff was bound to enforce the irritancy.

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\* Not reported.

The House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutor complained of affirmed, with L. 50 costs.' March 9. 1824.

J. DUTHIE—SPOTTISWOODE and ROBERTSON,—Solicitors.

(Ap. Ca. No. 10.)

CHARLES FRASER, Esq. Appellant.—*Moncreiff—Skene.*  
FRANCIS MAITLAND, Respondent.—*Gordon—Buchanan.*

No. 7.

*Landlord and Tenant—Singular Successor—Judicial Remit.*—Held, (affirming the judgment of the Court of Session), 1. That a singular successor is bound by a stipulation in a lease to pay for the value of houses which were erected prior to his purchase of the property. 2. That a tenant is not liable in damages for retaining the keys of the houses, after tendering them on condition that the landlord should concur in getting the value of the houses ascertained. 3. That a landlord is not entitled, at the termination of a lease, to claim damages from the tenant for mislabouring, where during the currency of the lease he has made no objection, and where there have been no rules laid down in the lease as to cultivation. And, 4. That a party who has consented to a remit to a professional person to report on disputed facts, is not thereafter entitled to insist on a proof.

In the year 1777, Alexander Leith, proprietor of the estate of Williamston, in Aberdeenshire, by a missive of lease let to Francis Thomson two adjoining farms, the one called North Williamston, consisting of 25 acres, and the other called Polquhite or Gateside, of 105 acres, for the period of two nineteen years. By the missive of lease it was stipulated, that the said 'Alexander Leith is to build at his own expense a sufficient fire-house and barn of stone and mortar, pinned with lime, which Francis Thomson is to get at an appreciation; and he is also to hold all the inventory on North Williamston, which belongs to the heritor, and what other sufficient houses he builds shall be held from him at an appreciation at the expiry of his lease.' In virtue of this missive, Thomson entered to possession, and Leith thereafter erected on the farm of Gateside a small house and barn, the former having only one chimney and fire-place, and both being only one storey in height, and covered with thatched roofs.

In 1791, Thomson was succeeded as tenant by his son-in-law, Francis Maitland, with consent of Leith; and Maitland thereafter erected additional buildings, consisting of wings attached to the dwelling-house and offices, for the use of the farm.

In 1797, and subsequent to these erections, the appellant,

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Lord Alloway.

March 9. 1824. Mr Fraser, purchased the property from Leith, and was infeft. In making this purchase, he alleged that no notice was given to him of the existence of any claim on the part of Maitland for the value of the houses built by him, or for any meliorations whatever.

In the missive of lease, there was no stipulation as to the mode of cultivation; and until 1812, no objection whatever was made by Fraser to the mode which had been followed by Maitland. A correspondence, however, took place in the course of that and the two subsequent years, as to the plan of management prior to the termination of the lease; and an arrangement was entered into, the import of which will be found in the interlocutor of the Lord Ordinary, to be hereafter quoted.

When the lease came to an end at Whitsunday 1815, several disputes arose between the parties; and, in particular, Maitland insisted for payment of the value of the houses which he had erected, and Fraser claimed damages for improper cultivation. Maitland then removed from the whole of the lands and houses, except a few acres in grass, to the possession of which he alleged he had right till Lammas, according to a custom in that part of the country. In order, however, to enforce a settlement of his claim for the value of the houses, Maitland, on removing, locked the doors, and carried away the keys with him, after tendering them to Fraser on condition that he would consent to a valuation being made. This having been declined, Maitland immediately presented a petition to the Sheriff of Aberdeenshire, praying him to appoint valuers to examine the buildings and report, and to decern for their value.

After a remit had been made to valuers to ascertain the value of the houses, Fraser raised an action before the Court of Session against Maitland, setting forth, that he had mislaboured the lands, and was illegally retaining possession of the houses and grass lands; and, therefore, concluding for decree of removing, for damages on account of mismanagement, and for violent profits. At the same time, he brought an advocation ob contingentiam of the process before the Sheriff, which was thereupon conjoined with the action at his instance; and Maitland having deposited the keys in the hands of the clerk, Lord Alloway ordained Fraser to give in a condescendence of his averments, and at the same time 'authorized the clerk to 'deliver to the pursuer, or his agent, the keys which have been 'lodged with him by the defender, and remitted to the Sheriff 'to nominate proper persons to value and appreciate the houses

‘and dung,’ &c. Under this order, the Sheriff, of consent of parties, named and appointed George Knox, builder in Aberdeen, for valuing the houses; and accordingly a valuation was reported by him, from which it appeared, that the whole tenement was worth L.261. 1s. 7d., and that, after deducting the value of the part which had been erected by the landlord, the sum due to the tenant was L.204. 5s. 1d. This report was approved of by the Sheriff without objection by Fraser. March 9. 1824.

Thereafter, in reference to the pleas of the parties, Lord Alloway pronounced this interlocutor:—‘1st, Finds, that by the lease of the subjects in question, the landlord bound himself to build a fire-house and a barn; and whatever other houses the tenant erected, it is declared, should be taken from him at an appreciation at the end of the lease; and he also agreed to take the houses upon Williamston according to their appreciations in the landlord’s inventory: But finds, that the fire-house and barn were built upon Polquhite or Gateside, where there were no houses before, and where the parties seem to have agreed to erect a new steading, the houses of Williamston having been allowed to fall to ruin. 2d, Finds, that the remit was made by the Sheriff to Mr Knox, builder and architect, with the consent of both parties, to inspect and value the houses in question; and that Mr Knox has accordingly given a very distinct valuation and report of the whole subjects separately, together with a plan; and that there does not appear to be any reason for suspecting the fairness or accuracy of that report. 3d, Finds, that by Mr Knox’s report, the value of the whole subjects is L.261. 1s. 7d. Sterling; but that, deducting the valuation of the middle house and kiln barn, as erected by the former proprietor, being L.56. 16s. 6d. Sterling, there remained due a balance of L.204. 5s. 1d. Sterling, on account of these houses: And finds the expense of causewaying in front of the court of offices, being L.3. 18s. 11d., being essentially necessary for the offices, has been properly included in the above valuation. 4th, Finds, that the above house and offices are not more than the accommodation necessary for a farm of 130 acres, where turnips are raised; and that it is not denied that the whole of these houses are at present occupied, or that the landlord has received the full benefit from them; and although it is stated for the landlord in the last proceedings, that the wings to the dwelling-house were built at the same time that the middle house was built, yet as the former proprietor was only bound to build one fire-house, and in all the former proceedings the landlord’s plea was, that the tenant

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‘ had built a larger house for his own accommodation as an inn, than was necessary for the accommodation of the farm, finds it unnecessary to lead any proof upon that subject. 5th, Finds, that no deduction can be granted on account of the houses of Williamston, in respect that the houses were removed to their present site, by the landlord having built the fire-house and barn at that place, which rendered the others totally unnecessary; and besides, the tenant was only liable for that part of the landlord’s inventory of the former appreciation, which has not been produced. 6th, Finds, that although the pursuer is a singular successor, yet as he bought the subjects under the condition in that lease, and in respect of the decisions referred to, and particularly of the very recent case, *Bells v. Lamont*, 14th June 1814, the pursuer must be liable in that valuation. 7th, Finds, that the pursuer has no claim for any alleged miscropping of the farm, in respect he stated no objections at the time, and did not put the tenant on his guard; and in respect to the allegation of the tenant having ploughed up land that was only two years in grass the last year, finds, that there was no restriction in the lease upon that subject, and that he would even have been entitled to do so, had there been no stipulation or agreement between the parties: But finds, that there had been an agreement betwixt Mr Jopp, the pursuer’s agent, and the respondent, or his son acting for him, by which, in order to avoid any question with regard to ploughing up grass lands, the respondent had agreed to surrender a field which had been already ploughed or ribbed, in order that the landlord, or the incoming tenant, might make turnips of it; and he also agreed to give the landlord or the incoming tenant his dung, at a valuation for that purpose, upon being repaid at the rate of 18s. per acre for ploughing and harrowing, and the price of the dung.’ After some other findings of a special nature, his Lordship repelled the claim by Fraser, ‘ founded on the tenant’s having kept possession of the key, and lodged it in process until the houses were inspected;’ and also a claim for the grass lands, in respect it is admitted, that by the custom of the country the tenant is entitled to keep possession of the sown grass until Lammas, and in respect that the pursuer has not particularly condescended upon such parts of the grass retained by the defender, beyond the period allowed by the custom of the country.’

Against this judgment Fraser reclaimed; and having alleged that the wings of the house had been erected by Leith, and that the offices were not suitable to the farm, the Court remitted to

the Jury Clerk to prepare issues on these points. He accordingly did so, and suggested the following:—‘ 1. Whether the wings of the farm-house of Gateside were erected at the expense of the then landlord, Mr Leith of Freefield?—2. Whether the offices on said farm were suitable to the said farm in point of size or extent?—3. Whether all, or part of the said offices, were in repair, and were sufficient houses at ? and what sum would have been required to put them in repair?’

To the latter issue it was objected, that it had been decided by the report of Knox; and accordingly, while the Court approved of the two first issues, they found ‘ respecting the third issue, it is unnecessary to send the same to the Jury Clerk, the question being already determined by the report of Mr Knox, upon mutual reference of the parties, which report was approved of by the Sheriff.’ In the meanwhile Maitland had died, and his son having been sisted in his place, the issues were sent to a jury; and no appearance having been made by Fraser, and Maitland having led evidence, a verdict was found in his favour, and a motion for a new trial was subsequently dismissed. Thereafter the Court, on the 15th December 1818, adhered to the interlocutor of the Lord Ordinary in toto.\*

After some other proceedings necessary to exhaust the cause, Fraser entered an appeal to the House of Lords, in which he contended that they ought to be reversed, for the following reasons:—

1. That they were erroneous, in so far as they subjected him in a personal obligation incurred by the former proprietor. In support of this plea he maintained, that he purchased the estate for a fair price, and paid full value to the seller for all the farm-steading or buildings which were upon the property. Prior to the statute 1449, ch. 18. the contract of lease was not effectual against a singular successor; but that statute merely secured to a tenant the right of possessing the lands till the expiration of the lease on payment of the rent. It did not declare that all the private contracts and stipulations between the landlord and the tenant, of a personal nature, should be effectual against purchasers; and in this case the claim resolved into one merely of debt contracted by Leith, the original proprietor, and was entirely indefinite.

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\* Not reported.

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2. That supposing that the appellant were liable for the debt, he could not be bound by the report of Knox as to the value of the houses. When his agent consented to a remit being made to Knox, he did not give his consent on the footing that his report was to be conclusive, but merely that his opinion as a professional man should be taken, subject always to be objected to as erroneous; and accordingly the appellant had offered to prove that it was so. And,

3. That he was entitled to damages, on account of the ground having been mislaboured, and of Maitland having kept possession of the keys for more than six months after the term of removal.

On the other hand, it was contended by Maitland,

1. That although it is no doubt true, that stipulations which are contrary to law, or which, though legal, remain entirely latent, are not available against singular successors; yet the case is entirely different where the conditions are lawful in themselves, and form part of the contract of lease. In the latter case, the condition or stipulation is good against singular successors; and the rule of law is, that they are held to read the leases, and to know and be bound by their contents. It is true, that leases cannot be converted into securities available against singular successors for debts; but it has been settled, that in matters properly connected with the lands, and forming the natural objects of the contract of lease, every stipulation is effectual against them. In the present case, the houses were necessary for the cultivation of the farm, and therefore formed one of the natural objects of the lease; and as the obligation appeared ex facie of it, Fraser was bound by it.

2. That as Fraser had not only acquiesced in the remit to Knox, but had actually proposed him as valuator, and as he had not complained of the approval of his report by the Sheriff, he must be held to have adopted him as a referee, and abandoned any right to a proof.

3. That in point of fact there was no mislabouring of the lands; but, at all events, a landlord is not entitled, at the termination of a lease, to rear up claims for mismanagement for an indefinite period, where he has made no objection during the currency of the lease; and accordingly, that point had been settled in the case of Broughton's trustees against Gordon. That with regard to the keys, they had been tendered under form of instrument to Fraser, upon condition of his agreeing

to have the houses valued, which he illegally resisted; and therefore, as it was entirely owing to himself that he had not obtained delivery of the keys, he could have no claim on that account.

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The House of Lords 'ordered and adjudged that the appeal be dismissed, and the interlocutors complained of affirmed, with 'L. 100 costs.'

*Appellant's Authorities.*—(1.) M'Dowall, December 17. 1760, (15,259.); Bell on Leases, p. 70. 166.

*Respondent's Authorities.*—(1.) Arbuthnot, February 5. 1772, (10,424.); Walpole, February 16. 1780, (15,240.); Bell, June 14. 1814, (F. C.)—(2.) Murray's Trustees, February 26. 1806; (No. 12. App. Tack.)

MEGGINSONS and POOLE—J. DUTHIE,—Solicitors.

(*Ap. Ca. No. 11.*)

WALTER FRANCIS, Duke of Buccleuch and Queensberry, and his Curators, Appellants.—*Sugden—Jeffrey.*

No. 8.

JOHN HYSLOP, Tenant in Halscar, and Sir JAMES MONTGOMERY, and Others, Executors of the late WILLIAM, Duke of Queensberry, Respondents.—*Moncreiff—Whigham.*

*Bona Fides.*—A tenant having acquired and possessed under a lease, granted in consideration of payment of a grassum and of the former rent, by an heir in possession under an entail prohibiting the granting of leases with evident diminution of the rental; and it having been the practice under that entail to grant such leases, and the opinion of lawyers and others that they were effectual; and one Division of the Court of Session having by repeated judgments found them lawful, and the majority of the whole Judges being of that opinion, but the House of Lords having found that the heir had no power to grant such leases;—Held, (affirming the judgment of the Court of Session), That the tenant was a bona fide possessor till the judgment of the House of Lords, and was not liable in violent profits prior to its date.

On the 26th of December 1705, James Duke of Queensberry executed an entail of the lands and estates comprehended in the dukedom of Queensberry, together with various other lands and baronies, which was recorded in the Register of Tailzies, and sasine taken. By this deed it was declared, that it should not be lawful to the heirs of tailzie, nor 'to any of them, to

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2D DIVISION.  
Lord Cringletie.



March 10. 1824. 'sell, wadset, or dispoone any of the foresaid earldom, lands, ' baronies, offices, jurisdictions, patronages, and others foresaid, ' nor any part of the same, nor to grant infeftments of liferent ' or annualrent out of the same, nor to contract debts, nor do ' any other fact or deed whereby the same, or any part thereof, ' may be adjudged, apprized, or any ways evicted from them, or ' any of them, except so far as they are empowered in manner ' after-mentioned, nor to violate or alter the order of succession ' foresaid any manner of way whatsoever.' And it was further provided, that the heirs of tailzie 'shall not set tacks nor rentals ' of the said lands for any longer space than the setter's lifetime, ' or for nineteen years, and that without diminution of the rental, ' at the least at the just avail for the time, nor do no other fact ' or deed, civil or criminal, directly or indirectly, by treason or ' otherwise, in any sort, whereby the said tailzied lands and estate, ' or any part thereof, may be affected, apprized, adjudged, for- ' faulted, or any manner of way evicted from the said heirs of ' tailzie, or this present tailzie, in order of succession, thereby ' prejudged, hurt, or changed.' These several prohibitions and conditions were fortified by clauses irritant and resolute, in regular and effectual form; but there was no clause prohibiting the taking of grassums.

Duke James died in July 1711, and was succeeded by Duke Charles, who was then a minor. During his minority the estates were managed by his tutors and curators, the Earl of Glasgow, Murray of Philiphaugh, Douglas of Cavers, Douglas of Dornock, and Douglas of Kelhead; and by them fourteen of the farms were let, for which grassums were taken. Duke Charles came of age in 1719, and executed a commission in favour of the above persons for the management of his estates; and in the execution of it they granted 206 leases, for all of which they received grassums. In 1726 Duke Charles added to his commissioners Lord Haining, one of the Judges of the Court of Session; Sir John Clerk, a Baron of Exchequer; the Lord Register; and Charles Erskine of Barjarg, Solicitor-General, afterwards Lord Justice-Clerk; and by them likewise leases were granted for grassums. In 1734 and 1761 Lord Grange, Lord Shewalton, Lord-Advocate Miller, and Lord Eliock, were also nominated as commissioners; and by them also the taking of grassums was sanctioned.

In 1763 Duke Charles altered this system, conceiving it disadvantageous to the tenants, and let the farms at a rack-rent; but it did not appear that he considered that he was under any prohibition from taking grassums. Accordingly, in execut-

ing an entail of the estate of Tinwald, he introduced an express prohibition against grassums as being necessary for that purpose. March 10. 1894.

Duke Charles died in 1778, and was succeeded by Duke William, who, during the period of his possession, (which extended to upwards of 40 years), was in the practice of letting the lands at the former rents, and receiving grassums. Among other farms which he so let was that of Halscar, which had been possessed for a great many years by the ancestors of the respondent, Hyslop. In 1797 Hyslop obtained a lease of that farm, at a public roup, for 19 years, on payment of a grassum of L.28 and a rent of L.30, and he received a separate obligation from the Duke to renew it annually. In 1800 it was renewed, for 19 years, on payment of a grassum,—again in 1801 for a grassum,—and in 1803 a new one was granted, also for 19 years, but for which no grassum was paid.

Duke William died in December 1810, having left a deed of settlement, by which he appointed Sir James Montgomery, and others, to be his executors and trust-disponees. He was succeeded by Henry Duke of Buccleuch, who, on receiving payment of the rents, qualified the receipts with 'reserving to his Grace the right of reducing the lease, and barring any exception that might arise from the granting this receipt.' He died, however, in 1812, before completing titles to the estate, and was succeeded by his son Duke Charles William, who made up titles, and having notified his intention of disputing the validity of the leases, the tenants on the estates intimated to the executors of Duke William that they intended to claim relief and damages under their clauses of warrandice out of the executry. The executors thereupon filed a bill in Chancery, where the tenants lodged claims to the extent of upwards of L.460,000. An action of declarator was then instituted in October 1813 by the executors against the Duke, to have it found and declared, that Duke William had power by the entail to grant leases of the above nature, and that they were effectual. This was followed, in February 1814, by an action of reduction, at the instance of the Duke, of the whole leases, on the allegation that Duke William had no power to grant them, and concluding for decree of removal and payment of the yearly worth and value of the lands from and after the year 1811, being the period of his father's succession to the estate. The tenants, at the same time, raised an action of relief against the executors; and the Duke subsequently brought an action of damages also against the executors. It was then arranged, that the general

March 10. 1834. question as to the validity of the leases should be tried in the declarator, and that the fate of all the leases and liabilities of the tenants (about 400 in number) should be regulated by the decision to be pronounced in the case of Hyslop, as to whom alone proceedings in the reduction, removing, &c. should take place. In defending himself, Hyslop was supplied with funds by the executors.

The cases having come before Lord Craigie, and his Lordship having reported them, the Second Division, on the 7th March 1816, in the action of declarator repelled the defences, and decerned in terms of the libel; and in the action of reduction assolvi'd the defender Hyslop.\* Against these judgments the Duke of Buccleuch having appealed, and certain other cases between the same parties and also with the Earl of Wemyss, having been discussed at the same time, the House of Lords, on the 10th July 1817, ordered and adjudged, that the said cause be remitted back to the Court of Session in Scotland, to review generally the interlocutor complained of in the said appeal, with reference to all and each of the grounds upon which the appellant has alleged that the tack, to which this cause relates, ought to be reduced in a question between the appellant and the lessee, as such, after the Court shall have first reviewed the interlocutor complained of in the cause between the Duke of Buccleuch and Sir James Montgomery, and others, executors and trust-disponees of the late Duke of Queensberry, deceased, in pursuance of a remit to the said Court in the said cause, of even date herewith: And it is further ordered, that the Court to which this remit is made do require the opinion of the Judges of the other Division on the matters and questions of law in this case, in writing; which Judges of the other Division are so to give and communicate the same; and, after so reviewing the said interlocutor complained of, the said Court do and decern in this cause as may be just.† On considering this remit, and the opinions of the Judges, the Court, on the 5th of February 1818, adhered to their former judgment.‡ The Duke again appealed, and the House of Lords, on the 12th July 1819, pronounced this judgment:—“It is ordered and adjudged, by the Lords spiritual and temporal in Parliament assembled, that the said interlocutor complained of in the said appeal be, and the same is hereby reversed: And the Lords find, that the late Duke of Queensberry had not

\* See Fac. Coll. 1815—1819, No. 44.

† See 5. Dow's Rep. p. 293.

‡ See Fac. Coll. No. 151.

‘ power, by the deed of entail founded upon by the parties in  
 ‘ this cause, to grant the tack in question in this cause, the same  
 ‘ having been granted upon the surrender or renunciation of a  
 ‘ former tack then unexpired, and which former tack had been  
 ‘ granted by the Duke at the same rent, and also for a sum or  
 ‘ price received by him; and the said tack in question, therefore,  
 ‘ having been granted partly in consideration of the rent reserved  
 ‘ thereby, and partly in consideration of a price or sum before  
 ‘ paid to the said Duke himself, and of the renunciation of the  
 ‘ said former tack: And find, therefore, that this tack of the 30th  
 ‘ December 1803 ought to be considered, in this question with  
 ‘ Hyslop, as let with diminution of rental, and not for the just  
 ‘ avail: And it is further ordered, that, with this finding, the  
 ‘ cause be remitted back to the Court of Session in Scotland, to  
 ‘ do therein as is just and consistent with this finding.’

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As this judgment did not actually reduce the leases, it was proposed on the part of the tenants to purge the irritancy at the Bar. But the Court, on the 29th February 1820, repelled that plea, assoitied from the declarator, and decerned in the reduction; and to this judgment they adhered on the 6th of July 1820.\* The case having then been remitted to the Lord Ordinary, to proceed in the remaining parts of the case, his Lordship, on the 11th of July, ordained the defender, Hyslop, ‘ to flit and remove  
 ‘ from the possession of the subjects in question, at the terms  
 ‘ following, viz. From the arable land at the separation of the  
 ‘ present crop from the ground; and from the houses, yards, and  
 ‘ grass, at the term of Whitsunday next, 1821; and decerns and  
 ‘ declares accordingly; and, quoad the other conclusions of the  
 ‘ libel, before answer, ordains the pursuers to give in a conde-  
 ‘ scendence of their claim of damages, and other conclusions of  
 ‘ the libel.’ In the meanwhile, an appeal had been entered against the judgment refusing to admit of purgation, but the House of Lords, on the 2d of July 1821, affirmed that judgment.† Duke Charles William having died, he was succeeded by Duke Walter Francis, who with his curators were sisted in his place.

When the case returned to the Court of Session, the Duke lodged a condescendence, claiming L.130 per annum as the yearly worth and value of the lands of Halscar, from and after 1811. Appearance was made in the reduction by the executors; and this demand was resisted by them and by Hyslop, on the

\* See Fac. Coll. No. 49. 1819—1822.

† See ante, Vol. I, p. 59.

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ground that they were not liable for any thing farther than the rents stipulated in the lease, in respect of bona fides, which it was maintained did not come to an end till the 2d July 1821, when the judgment refusing to admit purgation was affirmed; or at all events till 12th July 1819, when the interlocutors of the Court of Session were reversed, and it was found that Duke William had no power to grant the lease. On hearing parties, Lord Cringletie found, ' That the defender, John Hyslop, ought to be considered ' as having possessed his farm on a lease which he was in bona ' fide to consider to be legal and valid until the judgment of the ' House of Lords in July 1819; but that, after that period, he ' having been certiorated by said judgment that his lease could ' not be sustained as it thus stood, although it was not finally reduced till a later period, he was a mala fide possessor in virtue ' of said lease; and, therefore, is liable for such rent as the farm ' possessed by him could reasonably enable a tenant to pay, from ' and after Martinmas in the said year 1819; and appointed the ' pursuers to put in a condescendence, in terms of the Act of ' Sederunt, specifying the rent which they claim; and, quoad ' ultra, assoilzied the said defender from the demand of violent ' profits.' And to this interlocutor he adhered, by refusing a representation, for the reasons expressed in the following note:— ' Of all the cases that ever came into this Court, the present appears to the Lord Ordinary that about which there can be the ' least doubt. The noble pursuer admits that bona fides protects ' from accounting for fructus perceptos et consumptos; so that ' the general principle of law is admitted. Now, it is notorious ' that these Queensberry cases are the first instance wherein the ' generally received opinion has been declared erroneous, that ' taking grassums is illegal when lands are entailed in the manner that occurs in the Queensberry estate. The Lord Ordinary ' always considered that opinion to be erroneous; but his was ' singular. The judgment of the Court and the opinion of lawyers were opposed to his. The late William Duke of Queensberry and his tenants were guided by the received law of the ' country; and this was fortified by a judgment of the Second ' Division, assoilzieing Hyslop, and so promulgating that the advice on which he had acted in taking his lease was sound. It ' is therefore impossible for the Lord Ordinary to doubt, that, in ' this case, bona fides in Mr Hyslop ought to be presumed, until ' the judgment of the House of Peers undeceived him. That era ' the Lord Ordinary assumed as the period when bona fides must ' have been at an end; for although the lease was not set aside

by the judgment in July 1819, principles were then established which must have satisfied him, and every other person, that the lease, such as it was, could not be sustained. As to the arguments, that the executors of William Duke of Queensberry are bound to relieve Hyslop, and therefore that he is liable for violent profits before his bona fides was interrupted, the Lord Ordinary can pay no regard to it. Mr Hyslop, if he be entitled to the privileges of a bona fide possessor, must enjoy them, and is not to be liable to pay and seek his relief. This privilege is exemption from repeating the fruits he has reaped and consumed, and to leave the noble Duke to recover them, if he can, elsewhere.

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The Duke having reclaimed,—

*Lord Glenlee* observed:—The situation of a tenant is favourable in law, and violent profits are not due, except where the tenant has been duly warned, and knows that his possession is contrary to law. In this case there is nothing to take it out of the general principle. There is no appearance of any such fraud against the entail as to render the tenants liable on that ground; and I am not aware of any case where the tenant's right has been challenged, in consequence of a defect in his author's title, in which he has been subjected in violent profits, till the defect in that title has been made apparent.

*Lord Robertson*.—It is a sufficient defence if the fruits have been bona fide percepti et consumpti. Bona fides must rest on a reasonable ground, and continues till that is taken away. The time at which it will be held to terminate, must depend on the circumstances of each case; in some cases it will terminate by litiscontestation, and in others only by decree. In the present case there was every thing to create bona fides. It was the constant practice on the Queensberry estates to let leases for grassums; and this was done under the authority of learned lawyers, who never thought that such leases were contrary to the entail. The same practice was followed under similar entails; and this tenant's father and grandfather held leases granted like his own, for grassums, and which were never objected to. It is impossible, therefore, to conceive a stronger case for constituting bona fides. So far from this bona fides being removed by citation or litiscontestation, or any of the proceedings in this Court, it must have been confirmed, because this Court sustained the leases as effectual. The tenant, therefore, must be held to have been in bona fide till the judgment in the House of Lords on the 12th of July 1819, which, by laying down prin-

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ciples necessarily leading to a reduction of the leases, must have had the effect to put an end to bona fides. It is of no importance, in this question, that the tenants may have relief against the executors. If they are entitled to the fruits, they cannot be called on to restore them.

*Lord Bannatyne.*—The tenants must be considered to have been in bona fide till the judgment of the House of Lords in 1819.

*Lord Craigie.*—The present petitioner is an heir of entail, and has no title to demand the violent profits prior to the date of his own succession to the estates. The leases might have been set aside on the ground of fraud, independent altogether of the objection of grassums; and if that view of the case had been sanctioned by the House of Lords, then I would have held the tenants to have been in mala fide. But the House of Lords decided, that the leases were reducible in consequence merely of want of power on the part of Duke William; and I am clear, therefore, that the tenants can only be liable from the date of that judgment.

*Lord Justice-Clerk.*—Whatever my private opinion may be, I must hold the judgment of the House of Lords as containing a correct explication of the law of the case, and full effect must be given to it. There is not the slightest ground for demanding the violent profits since the death of Duke William; and I am equally clear that they are not due from citation or litiscontestation, because, at the time of the challenge, the opinion, both of lawyers and others, was in favour of the leases. It was also the universal practice under the entail, even when the estates were managed by Judges and lawyers, to take grassums. Accordingly, this Court unanimously sustained the leases, and, on a remit from the House of Lords, we adhered. It is impossible, therefore, that, up till this period, any doubt could have been created in the mind of the tenants, and consequently they must have remained in bona fide. But the judgment of the House of Lords must have had an opposite effect, and therefore I think, that the violent profits are due from the date of it.

The Court, therefore, on the 13th of November 1822, adhered.\*

His Grace then appealed to the House of Lords, and contended that the judgment ought to be reversed, for these reasons:—

1. Because Hyslop had occupied and maintained possession of his farm since the death of Duke William, under colour of a

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\* See 2. Shaw and Dunlop, No. 5.

tack which had been reduced as null and void, and so had March 10. 1824.  
unwarrantably excluded the appellant and his predecessors from the enjoyment of the farm for a period of eleven years, whereby they had sustained a great pecuniary loss.

2. Because the illegal possessor of that which belongs to another, and which that other is entitled to, and ought to have been in the full enjoyment of, is bound to make full restitution of those fruits of which the true owner has been thus deprived.

In support of this proposition it was maintained, that, in considering the question of bona fides, there was an established distinction between possession under a title void and null in itself, and possession under a title which was only voidable. In the latter case, a plea of bona fides was more easily entertained than in the former, because the possessor could not be presumed to be aware of the defective nature of his title till it was set aside, whereas in the former he was bound to know that it was no title at all. But here the leases were granted by the late Duke of Queensberry in the character of an heir of entail, and in reference to his titles and powers as such; and therefore those taking leases from him were bound to look to those titles, and to ascertain the powers bestowed upon him. By a judgment, however, of the House of Lords it had been declared, that the Duke had no power under his titles to grant the leases in question,—a circumstance which was established, not by extrinsic evidence, but by a reference to the entail and the leases themselves; and consequently these leases must be regarded as having been in themselves null and void, so that the tenants had no title to the possession, and stood in the situation of violent possessors. To this it was no answer to say, that the judgment had ultimately proceeded on a point of law which lawyers and Judges in Scotland had believed was not well founded; because, the law having been ascertained, must be held to have been all along in existence; and the maxim was universal, that ignorantia juris neminem excusat. If so, then there was no ground of distinction between the periods of possession anterior and subsequent to the judgment of the House of Lords in July 1819; and indeed the tenants had been certiorated in 1811, by the reservation in the receipts, that there was an intention to reduce their leases.

3. Because the hardship which usually attends a complete restitution of the fruits of a subject possessed and consumed in bona fide, did not exist here, seeing that the tenants had complete means of relief out of the funds of the late Duke of Queensberry; whereas, on the other hand, a grievous hardship would



March 10. 1824. be suffered by the appellant, who, together with his predecessors, had been kept out of possession by a long and obstinate litigation supported by means of the funds of Duke William. And,

4. Because, although the decisions of the Court of Session did not exhibit any uniform course of practice, and did not appear to fix any certain rule by which cases like the present were to be determined, yet, in several of their later decisions, the Judges had recognized the principle for which the appellant contended, and that it had also been sanctioned by the House of Lords in the case of Agnew. In the present case, the appellant was not insisting in any penal conclusion, or demanding violent profits, but was merely requiring payment of that which persons of skill considered to be the fair rent of the subjects.

On the other hand, it was contended by Hyslop and the executors,—

1. That possession bona fide was a good defence, not merely in equity but in law, against a claim for restitution of fruits perceptos et consumptos. In support of this plea it was maintained, that the principle of bona fide possession did not proceed upon the mere idea of there being a hardship in calling upon the possessor to pay what he had reaped and consumed, but on the principle, that, if he believed, and had conscientious and colourable grounds upon which to form a judgment, that his right was valid and effectual, then the fruits became by operation of law his own property; that the law of Scotland did not require, as the Roman law did, that the fruits should be actually consumed, it being sufficient that they had been reaped and mingled with the other estate of the possessor; and therefore the circumstance of means of relief existing was utterly irrelevant. But, besides, the right of relief was denied and resisted, so that if the tenants had a good defence on their bona fides, they could not be compelled to pay and then seek relief, and the utmost which the appellant could demand was an assignation to that claim of relief.

2. That by the judgment of the House of Lords, the leases had been found to be ineffectual, not on the ground of fraud or collusion, but in respect that Duke William had not power under the entail to grant the leases. Prior to this judgment, it had been the opinion of a great majority of the Judges in the Court of Session, of lawyers in Scotland, and of the country in general, that it was quite competent for an heir of entail, in the situation of Duke William, to grant leases for grassums, provided he did not diminish the rent; that, accordingly, the commissioners of the first heir of entail, (who were lawyers of the first reputation), and Duke William, under the best advice which he could

obtain, had uniformly taken grassums; and that such leases were so completely understood to be legal, that almost all the farms on the estate had been possessed by the ancestors of the present tenants, without a shadow of doubt crossing their minds as to their validity; and on the faith of their being effectual, numerous securities had been granted, and family settlements executed and acted upon. And, March 10. 1824.

3. That if Hyslop and the other tenants were in bona fide at the period when the action was brought, their bona fides, so far from being weakened, was confirmed by the judgments which were pronounced in the cause, and the opinions which were delivered on the Bench; and, therefore, they could not be subjected in more than the rents specified in their leases, prior to the date of the judgment of the House of Lords in July 1819.

In the course of the hearing at the Bar,

*The Lord Chancellor* observed, in reference to the plea that the tenants had the means of relief,—It can make no difference in this case, whether Duke William left one pound or a million. How could the tenants know what he might leave? He might have gambled it all in a race at Newmarket; therefore you need say nothing of the funds.

On the case of Agnew being referred to by Mr Sugden, his Lordship said,—Do not mention that case as an authority in this. The part of the judgment founded on has been struck out by the House; and although I am decidedly of opinion, that the House can judge of the whole conclusions of a summons, when the cause is brought here by an appeal, though only on one conclusion, yet in that case the House did not intend to give judgment on that point. The judgment, before being signed, was in the hands of the agents for a fortnight to make their remarks, yet not a whisper was heard on this point at that time. The fault, therefore, does not lie with those whose duty it is to draw up the judgments of this House. Lord Redesdale spoke strongly to the same effect.

Again, the *Lord Chancellor* asked Mr Sugden,—Do you put your case upon the circumstances, or upon the effect of citation, or litiscontestation?

*Mr Sugden*.—Upon the circumstances, certainly.

*Lord Chancellor*.—I understand that, in England, the citation would be enough, and in equity it would be so found. A party must hold that to be the law, and the law cannot be mistaken. But, in Scotland, all at the Bar are agreed, that it is the circumstances of the whole case, and that the citation does not of necessity entitle to recourse from that date.

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The House of Lords ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.\*

*Appellants' Authorities.*—2. Ersk. 1. 25.; 1. Bank. 8. 12.; 1. Stair, 7. 12.; Oliphant, Nov. 30. 1790, (1721.); Wedgewood, June 13. 1820, (not rep.); Duke of Athol, June 20. 1822, (1. Shaw and Dunlop, No. 560.); Agnew, July 1822, (ante, Vol. I. p. 320. and 413.); Jackson, July 5. 1811, (F. C.); 4. Stair, 29. 2.

*Respondents' Authorities.*—Dig. t. 16. l. 109.; 1. Stair, 7. 12.; 2. Stair, 12.; 2. Stair, 2. 24.; 2. Ersk. 1. 29.; 1. Bank. 8. 12.; 2. Ersk. 1. 25.; Buchanan's Rep. p. 470.; Bonny, July 30. 1760, (1728.); Grant, Feb. 9. 1765, (1760.); Lawrie, June 21. 1769, (1764.); Bowman, June 11. 1806, (No. 4. App. Bon. et Mal. Fides); Jackson, July 5. 1811, (F. C.); Duke of Roxburgh, Feb. 17. 1813, (F. C.); Turner, March 30. 1820, (F. C.)

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

(*Ap. Ca. No. 13.*)†

No. 9. WALTER FRANCIS Duke of Buccleuch and Queensberry, and his Curators, Appellants.—*Sugden—Jeffrey.*

Sir JAMES MONTGOMERY, and Others, Executors and Trustees of WILLIAM Duke of Queensberry, Respondents.—*D. of F. Cranstoun—Moncreiff.*

*Entail—Reparation.*—An heir in possession under an entail prohibiting the granting of leases with evident diminution of the rental, having let the lands on payment of grassums, and for the former rents; and it having been found by the House of Lords,—contrary to the opinion of the majority of the Judges in the Court of Session, and contrary to what had been the practice under the above and similar entails,—that the heir had no power to grant such leases; and no declarator of irritancy having been brought against the heir during his life, but an action of damages having been instituted after his death against his representatives;—Held, (affirming the judgment of the Court of Session, with a qualification), That the representatives were not liable in damages.

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2d DIVISION.  
Lord Cringletie.

AFTER the actions of declarator and reduction, noticed in the preceding case, had been brought, and were in dependence, the late Charles Duke of Buccleuch and Queensberry, the father of the appellant, instituted an action against the executors and trustees of the late William Duke of Queensberry, in which, after reciting the provisions of the entail, he set forth, 'That, notwithstanding the prohibitions contained in the

\* See the Lord Chancellor's Speech, post, p. 84.

† This and the five following Cases are reported, not in the order in which the papers are bound up in the Collection in the Advocates' Library, but in that in which they are referred to in the Lord Chancellor's Speech.

‘ said deed of tailzie, against selling or conveying away any part  
 ‘ of the said estate, or doing any other thing whereby the same,  
 ‘ or any part thereof, might be affected, adjudged, apprized, or  
 ‘ any ways evicted from the said heirs of entail, or granting  
 ‘ tacks thereof for any longer period than his own lifetime,  
 ‘ or nineteen years, and that without diminution of the rental,  
 ‘ at least at the just avail for the time, the said William Duke  
 ‘ of Queensberry did, in contravention of said deed of entail,  
 ‘ enter into contracts with sundry persons, whereby he became  
 ‘ bound, upon renunciation of leases which were then unexpired,  
 ‘ to grant to them tacks or leases of sundry parts of said lands and  
 ‘ estate, for the space of nineteen years, and to renew the said  
 ‘ leases for the said space of nineteen years annually during his  
 ‘ life; such contracts of lease thus extending the said persons’  
 ‘ right and possession as tenants to a longer period than the said  
 ‘ Duke’s own lifetime, or nineteen years, the alternative periods  
 ‘ permitted by said deed of entail; and in terms of which con-  
 ‘ tracts, various parcels of said lands and estate were, or still are,  
 ‘ possessed by the persons after-mentioned, and others: That,  
 ‘ from the time of his entering into possession of the said estate,  
 ‘ (in 1778), instead of letting the lands at fair annualrents, the  
 ‘ said Duke did never raise the annualrent of any part thereof,  
 ‘ but drew and put into his own pocket the whole surplus value  
 ‘ or rent under each lease, by a single anticipated payment from  
 ‘ the tenant at the time of granting the lease, which payments he  
 ‘ called grassums; and thus the said lands were, in contravention  
 ‘ of the prohibitions in the deed of entail, not only let respective-  
 ‘ ly for longer periods than is allowed by the said deed of entail,  
 ‘ but were affected, disposed, and evicted, contrary to the prohi-  
 ‘ bitions in the said deed of entail; and, further, were let with  
 ‘ diminution of the rental, and for rents known and intended to  
 ‘ be inadequate, and far less than the just avail.’

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The conclusions were, ‘ That it ought and should be found  
 ‘ and declared, by decret of our said Lords, that it was not com-  
 ‘ petent to, nor in the power of the said William Duke of  
 ‘ Queensberry, to let or grant any tacks or leases of any part of  
 ‘ the said lands and estate, by contracts of lease for nineteen  
 ‘ years, to be renewed yearly for the same period during his life-  
 ‘ time as aforesaid, nor for any longer term or period than his  
 ‘ own lifetime, or nineteen years, except in terms of, and under  
 ‘ the provisions of the Act of the 10th of our reign, chap. 51.;  
 ‘ nor to grant any tacks of the said lands and estate in conside-  
 ‘ ration of rents paid by anticipation as aforesaid, nor with the

March 10. 1824. 'diminution of the rental as aforesaid, nor under the just avail as aforesaid; and the several contracts of lease, tacks, and leases, above-mentioned, having all and each of them been so granted in contravention of the provisions in the said deed of entail, are void and null, and of no force or effect, in prejudice of the pursuer as heir of entail aforesaid: And the pursuer having suffered great loss and damage, by reason of the said respective contracts and leases having been granted by the said deceased William Duke of Queensberry, in contravention of said deed of entail as aforesaid, the said Sir James Montgomery, Thomas Coutts, William Murray, and Edward Bullock Douglas, executors and trust-disponees aforesaid, ought and should be decerned and ordained, by decret forésaid, to make payment to the pursuer of the sum of L.500,000 Sterling, or such other sum as our said Lords shall modify as the damages sustained, or which may be sustained by the pursuer, by and through the said William Duke of Queensberry his illegal and unwarrantable granting of the said leases,' &c.

In defence against this action the executors maintained, that it was incompetent; and that, at all events, if the leases should not be reduced, then the action would be entirely groundless; and if, on the other hand, they should happen to be reduced, then the Duke would be restored against the effect of the leases; and as the executors would be liable in relief to the tenants, they could not also be subjected in damages to him. The action was sisted till the ultimate issue of the declarator and reduction; and the proceedings having thereafter been resumed, and the present appellants being sisted in place of the late Duke Charles William, the Lord Ordinary assoilzied the respondents, reserving entire to the appellant to claim from the respondents the whole or part of the grassums taken and received by the late William Duke of Queensberry from his tenants, and to the respondents their defences. On advising a representation for the appellants, his Lordship adhered, and issued the following opinion:—'The ground on which damages are demanded from the executors of William Duke of Queensberry, is, that his Grace entered into a combination with his tenants on his estate to defraud the heirs succeeding to it, and let leases, reserving therein a small rent, and taking sums of money as grassums from these tenants; that it has been found that these leases are void and null; and as, by means of them, the present Duke of Buccleuch has been prevented from drawing the full value of his estate since the death of the said Duke William, his Grace

is entitled to damages from the defenders, the executors of Duke William. March 10. 1824.

The Lord Ordinary delivered his opinion, that damages could only be due when they arose out of some real or presumed delinquency; and as the leases were granted by Duke William in conformity to the received law of the country, as was even afterwards declared by the Lords of the Second Division, his Grace, by managing his estate in conformity to what was understood to be strictly legal, cannot be held to have committed any delict whatever. The judgment of the House of Peers ascertains, that the received opinion was wrong; it has established, that Duke William *had no power* to grant such tacks; and of course that they are null; but it has not found, that the Duke granted these leases with the single intention of defrauding his heirs. His Grace granted them with the view of amassing money to himself; and the injury of the heirs was only the consequence, but not the object of his conduct; and therefore the Lord Ordinary thinks that the noble representer pleads his cause too highly, when he accuses the Duke of being actuated by the desire to injure his heir.

But, secondly, it is pleaded, that even admitting the Duke to have been in bona fide, yet his granting these leases was an illegal act; and as ignorance of law excuses no man, his Grace's executors are liable to redress the damages suffered by that illegal act. The Lord Ordinary readily allows the truth of the maxim, "*Quod ignorantia juris neminem excusat*;" which is demonstrated by what has happened to the tenants. Their leases, which they considered to be good, are set aside, and they have been removed from their farms. Had the Duke of Queensberry been alive, and a reduction of these leases been brought, accompanied by a declarator of irritancy, his Grace might have forfeited his estate, if he could not redeem the leases. A person who purchases an estate a non domino, will have it evicted from him by the true owner; and to these lengths ignorance of the law excuses no man, nor covers him from loss. But to make him liable for damages on account of an innocent error in law, is going a step further, for which the Lord Ordinary is not aware of any authority. By the law of Scotland, an entail must be recorded in the Register of Tailzies, in order to be effectual against the public; and after it is so recorded, every man is understood by law to be as well acquainted with its contents as the heirs who possess under it. If, therefore, the Duke of Queensberry was guilty of a fraud, the whole tenants

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‘ were participants in it, and ought equally to be liable as his Grace’s executors, because ignorance of law cannot protect the former, more than it does the latter. But the Lord Ordinary has found, that they are not liable for additional rents, but are protected by their bona fides till July 1819, when the error in law was declared by the House of Lords; which he did in conformity to all opinions of our authors, and decisions of this Court. The loss suffered by the noble pursuer is one arising out of the law itself, since it is occasioned solely by the principle of bona fide possession, for protecting the tenants during its existence; and consequently it seems impossible to find the Duke’s executors liable for damages, who have not reaped any benefit by the leases since the Duke’s death, when the tenants, who were participants in the wrong, and have enjoyed all the advantages, have been absolved.’

The appellants having reclaimed,

*Lord Craigie* observed :—I am of a different opinion from the Lord Ordinary. The question of bona fides must not be mixed up with the one which is before us, and cannot affect our judgment. In regard to the grassums, the claim for them is reserved; and I have no doubt that it is well founded. These grassums, according to the judgment of the House of Lords, were just anticipated rents, which it is impossible could be bona fide percepti et consumpti by Duke William. But the question here is, whether the loss actually sustained by the present Duke, must not be made up by the representatives of Duke William? I cannot hold that he was in bona fide in granting the leases. He did what by his own title he was prohibited from doing. He took payment of rents by anticipation, and let the lands at a rent diminished in a corresponding proportion. But a party who has suffered wrong by the act of another, is entitled to reparation. An excess of power is sufficient to give rise to such a claim. But here there is more than a mere excess of power, because the Duke did what, it has been now settled, he was prohibited from doing by his own titles.

*Lord Glenlee*.—The question as to restitution of the grassums has been properly separated from that relative to the claim of damages. To create such a claim, the party from whom the damages are sought must have done something contrary to an express or implied obligation. There was no obligation on the Duke to raise the rental; and suppose that the Duke, without taking grassums, had let the lands at the same rent as formerly, could the present Duke have claimed damages on that account?

I apprehend not. Although this might have been a wrong on his part, yet it is not one of that tortious or criminal nature which can give rise to a claim of damages against his representatives. March 10. 1824.

*Lord Robertson.*—It cannot be denied that an injury has been suffered by the present Duke and his predecessors in consequence of the act of Duke William; and I doubt extremely whether his bona fides can protect him or his representatives against a claim for reparation of loss actually sustained by his illegal act. There is nothing in the plea, that the damage has been occasioned by the tenants maintaining the possession; because they are the mere instruments by which the damage has been committed. There is, however, much more in the argument, that the act of the Duke, whereby an injury has been sustained by the heir-substitute, is not one which falls under the entail or the Act 1685. The only remedy provided for a violation of any of the prohibitions, is a declarator of irritancy. But the substitutes have never availed themselves of that which was their only legal remedy; and now when the contravener is dead, they bring an action of damages against his representatives, and when it is no longer possible to purge the irritancy. Such an action, I apprehend, is incompetent.

*Lord-Justice Clerk.*—I concur in opinion, that the claim for the grassums has been properly reserved. We have already found, that the tenants are liable for violent profits posterior to the judgment of the House of Lords; and the question which we have now to decide is, whether, independent of that claim, the present Duke is entitled to demand damages from the representatives of Duke William? It is remarkable, that there is no instance of any action similar to this. It is also a material feature in the case, that although Duke William acted for upwards of thirty-two years in open violation of the entail, no attempt ever was made till after his death to dispute his powers. If a declarator of irritancy had been brought during his life, he might have purged; but this could not be done after his death. The heir-substitute now claims damages; and the question is, whether he can competently do so? The statute 1685 points out the remedy for contravention, which remedy is the voidance of the right of the contravener; but there is no provision, that over and above voidance, the heir-substitute shall be entitled to claim damages from the contravener. Independent, however, of this, it is impossible to hold, that Duke William was doing an act, when he let the lands for grassums, which he either knew or thought to be contrary to his powers under the entail.



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The Court, therefore, on the 13th November 1822, adhered to the interlocutor of the Lord Ordinary.\*

Against these judgments the appellant entered an appeal, and maintained that they ought to be reversed,—

1. Because the leases were granted by Duke William in contravention of the entail under which he held the lands, and in violation of the personal obligation under which he lay to fulfil the conditions of that entail; and having been the cause of patrimonial loss to the appellant, the respondents, who were his representatives, were bound to repair that loss. In support of this plea it was maintained, that every heir who enters into possession of an entailed estate, undertakes a personal obligation to observe all the different conditions of the entail; but in this case, the leases were granted in contravention of a prohibition in the entail, whereby the Duke was guilty of a wrong. By that wrong, damage had been sustained by the present Duke; seeing that, in consequence of the leases, he and the two immediately preceding Dukes (whom he represented) had been excluded for eleven years from the enjoyment of a large proportion of the rents of the entailed estate. For reparation of this damage, the estate of Duke William was clearly responsible; and therefore the respondents, who were in possession of that estate, ought to be subjected in these damages. Such a claim was perfectly competent; because, although this was an entail fortified by irritant and resolute clauses, which were made to preserve the estate to the succeeding heirs, yet the prohibitions created a personal obligation, which, if violated, gave rise to a claim of reparation or damages. It was true, that inhibition or interdict could not be executed so as to protect the heirs against the violation of that personal obligation, and that they could only have recourse during the life of the contravener to a declarator of irritancy; but, nevertheless, a claim of damages was perfectly competent, and was so more especially where the demand was (as in this case) for restitution of the profits illegally acquired out of the very fund which had been created by means of these profits. It was also true, that no declarator of irritancy had been brought during the life of the Duke, but that was *res mere facultatis*, and the omission to institute it could not have the effect to deprive the injured party from obtaining reparation in the shape of damages.

2. Because the circumstance which occasioned the appellant's

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\* See 2. Shaw and Dunlop, No. 7.

loss was the occupation of his estate by the tenants, and which March 10. 1824.  
 occupation was maintained at the instigation and at the expense of the respondents, to whom it was profitable in the same proportion in which it had been prejudicial to the appellant. The fact that the litigation had been maintained at the expense of the respondents was admitted, and therefore the plea, that if any damage was created, it arose from the act of the tenants, was untenable; neither could it be contended that the bona fides of these tenants could be available to the respondents. On the contrary, if that defence were effectual to the tenants, the claim of the appellant against the respondents was just so much the stronger, seeing that the illegal title on which that bona fides was rested had been granted by the constituent of the respondents; and if the appellant could not get redress from the tenants for that which was undoubtedly an injury, he ought to obtain reparation from the respondents.

In answer to these pleas, it was contended on the part of the executors,—

1. That an action of damages was not competent under the Queensberry entail, the remedies given by the entailer in cases of contravention being of a quite different nature. In reference to this plea it was argued, that in a regular entail the maker lays certain injunctions on the heirs, or prohibits them from doing certain things, and he gives effect to these injunctions and prohibitions by the irritant and resolute clauses. He makes his will effectual by declaring all acts done in contravention to be null and void; and he further secures obedience by inflicting a most severe penalty on the contravener,—the forfeiture of his right to the estate. He gives power to the remoter heirs to protect their rights by reducing the deed prohibited, and by declaring an irritancy against the granter. These are the only remedies which the entail gives, or which are sanctioned by the statute 1685, no mention being made of the payment of damages in the event of contravention, in lieu of, or in addition to the forfeiture. Accordingly, in the Queensberry entail there is no provision for payment of such damages; and as it was made conformable to; and under the Act 1685, which declares the irritant and resolute clauses to constitute the only effective part of an entail, an action for damages was incompetent. It had been settled, that entails were liable to the same strict interpretation *inter hæredes* as in a question with third parties; and therefore, the provisions could not be extended beyond those which were contained in the deed itself. But the non-existence of such a personal obligation

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as was alleged by the appellant, was demonstrated from the circumstance that it could not be made effectual by protective diligence, and that an heir of entail, who is not effectually tied up by an irritant or resolute clause, has not only the power, but the *right* to violate the most express prohibition, and is entitled to have this right declared by a court of law. The remedy, therefore, which the appellant or his predecessors ought to have taken was, to have brought an action of declarator of irritancy and of forfeiture against the late Duke, which, however, they had not done.

2. That supposing an action of damages were competent, the damage had been done by the tenants since the Duke's death, and the tenants alone were responsible for them. It was of no importance in this question by whom the expenses of the litigation were defrayed. The tenants had a sufficient interest to maintain the validity of their leases, and accordingly they did so, and retained possession. They might, if they had thought fit, have abandoned the possession, in which case no claim of damages could have been made against the respondents by the appellant. It was plain, therefore, that if any damages existed, they had been caused by the tenants; but as the tenants were bona fide possessors, no claim could be made against them, and if so, the loss sustained by the appellant was one which was thrown upon him by the law itself. And,

3. That as the Duke conceived that he was exercising the powers vested in him by the entail in granting the leases, the plea of bona fides was equally as available to him as to the tenants; and therefore, no claim for restitution could lie against him or his estate.

*The Lord Chancellor* asked the appellant's Counsel, in the course of the hearing, Can you bring an action for damages against the heir in possession for having done a certain act,—making a lease for example,—before you have brought a declarator of irritancy?

*Jeffrey*.—Certainly not during the life of the contravener.

*Lord Chancellor*.—Then, can you bring an action of irritancy, and then an accounting for profits? and supposing bona fides to protect the actual possessor, can you still have damages? To this no answer was made.

The House of Lords 'ordered and adjudged, that the interlocutors complained of, so far as the same are judgments upon 'the subject in litigation between the parties, be affirmed.'\*

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\* See Lord Chancellor's speech, post, p. 84.

*Appellants' Authorities.*—3 Ersk. 8. 23.; 1. Bank. 584.; 2. Stair, 3. 59.; Hope's March 10. 1824. Min. P. 402.; 3. Ersk. 3. 86.; Cumming, July 29. 1761, (15,513.); Lockhart, June 11. 1811. (see foot note, 5. Shaw and Dunlop, p. 424.); 2. Stair, 3. 58.

*Respondents' Authorities.*—Strathnaber, Feb. 2. 1788, (15,373. and Craigie and Stewart, p. 32.); Bryson, Jan. 29. (15,511.); Lockhart, June 11. 1811, as remitted.

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

(*Ap. Ca. No. 14.*)

Sir JAMES MONTGOMERY, and Others, Executors of WILLIAM No. 10.  
Duke of Queensberry, Appellants.—*D. of F. Cranstoun—Cockburn.*

JOHN HYSLOP, Respondent.—*Moncreiff—Whigham.*

*Warrandice—Reparation—Lis Alibi.*—An heir in possession under an entail prohibiting alienation and granting of leases with evident diminution of the rental, having granted a lease for payment of a grassum, and binding himself to warrant the lease; and having died, leaving one set of executors in England, and another set in Scotland; and the former having lodged the executry funds in the Court of Chancery, in England, and called on all having claims to give them in; and the tenant having claimed a certain sum as damages in the event of his lease being set aside; and thereafter his lease having been reduced;—Held, (affirming the judgment of the Court of Session), 1. That the tenant was not barred by the proceedings in Chancery from raising an action before the Court of Session, claiming reparation on the warrandice from the Scottish executors; and, 2. That he was entitled to reparation.

IN 1787, John Hyslop, father of the respondent, obtained a lease from William Duke of Queensberry of the farm of Halscar, for 19 years, at the rent of L.30, and a grassum of L.26. He renounced that lease in 1797, and obtained a new one for 19 years, at the same rent, and for a grassum of L.28, —the Duke of Queensberry binding himself personally to renew the lease for 19 years in every year of his own life if required. This lease of 1797 was renounced in 1803, and a new one was granted at the former rent, without any grassum, by Mr Craufurd Tait, as commissioner for, and 'as having full powers 'from, the said Duke, to grant, subscribe, and deliver tacks or 'leases of all lands pertaining to his Grace in Scotland, and that 'to the extent of such term or terms of years as permitted by the 'respective deeds of entail of the said estates; conform to com- 'mission in favour of the said Craufurd Tait.' The lease con-

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2D DIVISION.  
Lord Cringletie.

March 10. 1824. tained a clause of absolute warrandice, in these terms:—‘ Which tack his Grace binds and obliges himself, his heirs and successors, to warrant to the said John Hyslop, and his aforesaid, ‘ at all hands and against all mortals, as law will.’ In virtue of this lease, Hyslop thenceforth enjoyed possession. On the 23d of December 1810, Duke William died, and was succeeded by Duke Henry, who having died in January 1812, Charles William, Duke of Buccleuch and Queensberry, obtained possession as the next heir of entail.

Duke William appointed two separate sets of executors, by two different deeds, the one being a will in the English form, under which certain gentlemen were appointed to act as executors in England; and the other being a Scotch deed, under which the appellants were nominated executors in Scotland.

Duke Charles William having announced an intention to object to the leases which had been granted by Duke William on grassums, amounting in number to upwards of 300, and the tenants having threatened to seek relief, the executors who resided in England filed a bill in Chancery, to the effect of having the executry distributed among the claimants by that Court; and an advertisement was inserted in the newspapers, requiring all persons having claims to lodge the same with the Master within a certain period. Claims were accordingly lodged by the tenants to the extent of upwards of L.460,000; and in particular, a claim was given in by Hyslop, stating the nature of his lease,—the warrandice it contained,—the chance of the farm being evicted,—and that, in such event, ‘ the estate of the said late William Duke of Queensberry will become justly and truly ‘ indebted to the said claimant in the said sum of L.830, as and ‘ for such compensation as aforesaid;’ and therefore concluding with a prayer, that ‘ the executors of the said late Duke of Queensberry, or this honourable Court, taking on itself the ‘ administration of the personal estate of the said late Duke of Queensberry, will be pleased to set apart as much of the estate ‘ and effects of the said late Duke of Queensberry as will be sufficient to indemnify and compensate this deponent.’

Thereafter, in 1814, Duke Charles William raised an action of reduction of the whole leases which had been granted by Duke William, on the ground that they were contrary to the powers enjoyed by him under the entail. (See the two preceding cases). Hyslop thereupon brought an action against the appellants, the executors of Duke William, in which he concluded, that they ‘ Ought and should be decerned and ordained, ‘ by decree of the Lords of our Council and Session, to maintain

‘and defend the pursuer, and his foresaids, in the peaceable possession of the said lands and others, let by the said tack in manner foresaid, during the whole years and terms thereof yet to run, and according to the terms, and under the conditions therein specified; and to make payment to him of the expenses incurred, or to be incurred by him in defending the said process of reduction;—and, generally, to relieve him of the said action, and all its consequences; or otherwise, the said defenders ought and should be decerned and ordained, by decree foresaid, to make payment to the pursuer of the sum of , or such other sum as shall be ascertained in the course of the process to follow hereon, as the loss and damage occasioned to the pursuer by the said defenders, as disponees and executors foresaid, and their said factor, their failure to maintain and defend the pursuer in his said possession, in manner foresaid, in terms of the obligations by the said deceased William Duke of Queensberry, in the said tack to the pursuer before-mentioned.’

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As the same principle of decision in the question as to the validity of the leases would apply to them all, that of Hyslop was selected to try the question with the Duke; and for the purpose of resisting his action, the executors supplied Hyslop with funds to carry on the litigation. After a great deal of discussion, the House of Lords ultimately pronounced a judgment on the 12th of July 1819, reversing the interlocutors of the Court of Session, and finding that the leases were reducible; in consequence of which the Court, on the 29th of February 1820, decerned and declared accordingly; and a remit was made to the Lord Ordinary to hear parties on a claim, made by the Duke, for the violent profits during the period the tenants had been in possession.

In the meanwhile the action of relief brought by Hyslop had been allowed to fall asleep; but in consequence of the reversal it was awakened in 1822, and the executors thereupon lodged these defences:—

‘1st, The defenders are trustees and executors, named by the late William Duke of Queensberry, for the administration of his property in Scotland only. The funds in Scotland, with the exception of a debt which the debtor retains till he is relieved of an obligation come under to the tenants on the March estate, are trifling and already exhausted. The funds in England are under the administration of the English executors, or are more properly in the hands of the Court of Chancery. The pursuer has made a claim in that Court for the sum of L. 830,

March 10. 1824. ' as a compensation which will be due to him in case his lease is  
' found to be invalid in the action of reduction at the instance of  
' the Duke of Buccleuch, and a part of the funds to that amount  
' has been set aside to answer his claim. But having thus claim-  
' ed his relief in the English Court, it is not competent to the  
' pursuer to carry on an action for the very same thing in the  
' Court of Session.

' 2d, Were it competent to try the question in this Court, it  
' is premature to proceed with it at present. The pursuer's  
' lease expires naturally at Whitsunday next, the term at which  
' he is decerned to remove. He has, therefore, no claim to be  
' relieved of any thing but the violent profits which may be found  
' due to the Duke of Buccleuch. But it is as yet quite uncertain  
' if any sum will be found due on this head; for although the  
' Lord Ordinary found the pursuer liable in violent profits for  
' the two last years of the lease, yet this judgment is not acqui-  
' esced in.

' Independently of this, it is premature to proceed with the  
' present action until the question of violent profits shall be de-  
' termined by the Court. The Duke of Buccleuch claims these  
' profits from the death of the late Duke of Queensberry,—a  
' claim which can only proceed on the ground that the pursuer  
' was in mala fide at the time he took his lease. But the bona  
' or mala fides of the tenant, at the time of contracting, must  
' have a material influence on his right to claim relief; and this  
' cannot be judged of with any propriety, so long as the point  
' has not been settled in the principal and leading action with  
' the Duke of Buccleuch.'

In answer to these defences Hyslop maintained,—

1. That the plea of *lis alibi* was unavailing, because the claim which he had lodged in the Court of Chancery was merely of the nature of a notice that he had a demand, to the extent there specified, on the executry, and was not intended for the purpose of trying the question as to his right of relief, but merely as a caveat to the executors not to distribute the funds till the matter of right had been settled: that accordingly no bill had been filed by Hyslop, nor had any discussion taken place equivalent to *litiscontestation* between the parties: that even if *litiscontestation* had taken place, still, as the judgment of the Court of Chancery would not be *res judicata*, and could not be carried into immediate execution in Scotland, and as *lis alibi pendens* could not be pleaded where the judgment would not form *res judicata* between the parties, so the proceedings in the Court of

Chancery could be no bar to the action of relief; and besides, the executors who appeared in Chancery were different from those against whom the action had been brought. March 10. 1824.

2. That as the action of reduction was brought in 1814, and the present process of relief was then instituted; and as it was not necessary, in order to found such a process, that there should be actual eviction, it was not premature: and at all events, as that eviction had now occurred, and as Hyslop had been found liable in violent profits subsequent to the judgment of the House of Lords, he was entitled to insist for relief against the executors. And,

3. That although the question of bona fides was still under discussion with the Duke, and although it was alleged by him that Hyslop, by his knowledge of the terms of the entail, must be held to have been in mala fide all along; yet even if he should succeed in establishing that proposition, it could not affect Hyslop's right of relief from the executors, as the representatives of Duke William.

The Lord Ordinary found the executors liable in relief, and at the same time communicated his opinion in this note:—‘ In pronouncing the above interlocutor, the Lord Ordinary was influenced by the consideration, that the pursuer is entitled to have the point determined, whether he has a right to relief or not; because that matter being left in abeyance, must injure his credit, and possibly prevent him from obtaining a lease, which otherwise he might acquire.

‘ 2dly, That as some violent profits are indisputably due by him to the Duke of Buccleuch, he is entitled to receive them from the defenders, that he may pay them to the Duke, and is not to be forced to pay these, and only then begin to try the question, whether he is entitled to relief or not?

‘ 3dly, That, therefore, he is not obliged to wait to see what grounds the Duke may state for subjecting the defenders and pursuer to violent profits; since, whatever the Duke may or can state, the defenders may now plead the same, both in law and in fact; and as they are the only party in this cause, the Lord Ordinary thinks that the pursuer is entitled to call on them to plead it, or allow a decree of relief to pass against them.’

The executors having represented, the Lord Ordinary refused the representation, on the grounds stated in the following note:—  
‘ The Lord Ordinary cannot consider the claims made in Chan-



March 10. 1824. ' cery by the respondent, and the other tenants of the late Wil-  
' liam Duke of Queensberry, as forming a *lis alibi pendens*.  
' These claims were made at the requisition of his Grace's execu-  
' tors, to shew them the amount of the money demanded by the  
' tenants in the event of their being deprived of their leases. The  
' claims acted merely as a caveat to the executors not to part  
' with the money until the tenants should be heard.

' 2dly, In order to enable the tenants to claim effectually, they  
' would be obliged to shew that they have been dispossessed  
' while their leases were current, or obliged to pay higher rents  
' than those reserved in their leases; they would also be obliged  
' to shew the consequences resulting from such molestation: and  
' as all this depends on Scotch law, no such proper measure can  
' be adopted, as to have these consequences declared and ascer-  
' tained by a judgment of this Court.

' 3dly, It appears to the Lord Ordinary that the fears of the  
' representers are affected, when they anticipate injury to them-  
' selves or their co-executors from a judgment finding the tenants  
' entitled to relief. For, what use can they make of it in Chan-  
' cery? Were they to go there with their judgment, they would  
' be told, that, being indefinite, nothing could be done upon it,  
' and that they must ascertain the quantum of relief before they  
' could draw a farthing.

' It is next said, that this action is prematurely insisted in;  
' and, on this topic, the representers argue their cause as if this  
' were an insulated action, brought for the purpose of obtaining  
' relief; before it could be known whether or not there was any  
' distress. But before the Lord Ordinary there is an action for  
' reducing Hyslop's lease, and for violent profits; and the lease  
' has not only been reduced, but he has been found liable for  
' violent profits; and consequently his action claiming relief is a  
' natural and reasonable concomitant of the other, and falls to  
' be disposed of at the same time. It is true that Hyslop's lease  
' expires at Whitsunday next, and that he will not be dispossess-  
' ed during his lease; and the Lord Ordinary believes it to be  
' also true, that the representers have hitherto paid Hyslop's  
' expenses of litigation: but still the only consequence of that is  
' to diminish his claim of relief, not to take it away; for the Lord  
' Ordinary has found him liable for violent profits from and after  
' Martinmas 1819; and to that extent he has a claim of relief.

' Lastly, The representers plead, that they have not been heard  
' on the point of law—how far Hyslop is entitled to relief from

‘them. To which the Lord Ordinary answers, that if they have March 10. 1834.  
 ‘not been heard, it is their own fault. Every litigant is bound  
 ‘to bring out all his defences at once, and not to pop them out  
 ‘one by one, in order to procure delay, as seems to be the object  
 ‘of the representers. They have specified shortly their different  
 ‘grounds for not being liable to relieve Hyslop, which the Lord  
 ‘Ordinary confesses do not move him to alter his opinion. The  
 ‘lease in question contains a clause of absolute warrandice in  
 ‘favour of Hyslop, the very purpose of which was to secure him  
 ‘against molestation in his possession. The very nature of ab-  
 ‘solute warrandice proves the anticipation of the possibility of  
 ‘the granter of a deed having no power to grant it; and it is  
 ‘for the purpose of securing the grantee against some unknown  
 ‘ground of challenge that it is introduced. In this particular  
 ‘case it is known to a certainty, that the contracting parties were  
 ‘in bona fide to believe that the one was in safety to give,  
 ‘and the other to receive the lease. There is, therefore, no  
 ‘ground for any allegation of turpe pactum to void the obliga-  
 ‘tion of warrandice; and, accordingly, the Lord Ordinary has  
 ‘found, that Hyslop’s bona fides protects him from being liable  
 ‘for violent profits sooner than from Martinmas 1819. On the  
 ‘whole, after judging of this case, in combination with the others  
 ‘before the Lord Ordinary, he has no hesitation in refusing this  
 ‘representation.’

The executors having reclaimed,

*Lord Robertson* observed:—The defence rested on the pro-  
 ceedings in Chancery is not well founded. They were at the  
 instance of a different set of executors from those who are here.  
 Besides, they afford no reason for our not deciding the general  
 point of liability.

*Lord Justice-Clerk*.—The Chancery proceedings afford no plea  
 of *lis alibi*. The warrandice is effectual to sustain the claim  
 which is here made. It binds the Duke to secure the peaceable  
 possession of the farm, which has not been done, and the tenant  
 has been found liable in violent profits.

The other Judges having concurred, the Court, on the 13th  
 of November 1822, adhered.\*

Against these judgments an appeal having been entered by the  
 executors on the grounds urged by them in defence, the House  
 of Lords ‘ordered and adjudged that the appeal be dismissed,  
 ‘and the interlocutors complained of affirmed, with L. 200 costs.’

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\* See 2. Shaw and Dunlop, No. 6.

March 10. 1824. *Respondent's Authorities.*—(1.) Cuninghame, Feb. 27. 1705, (8284.); Mares, Jan. 2. 1728, (8384.); Coutts and Co. March 8. 1769, (8292.); May 25. June 1799, (8293.)—(2.) 2. Stair, 3. 4. 6.; 2. Ersk. 3. 36.

J. CHALMER—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No. 12.*)

No. 11. FRANCIS Earl of Wemyss and March, Appellant.—  
*Sugden—Jeffrey.*

Sir JAMES MONTGOMERY, and Others, Executors of WILLIAM Duke of Queensberry; and WILLIAM MURRAY, Tenant in Whiteside, Respondents,—*D. of F. Cranstoun—Moncreiff.*  
*Et e Contra.*

*Bona Fides—Entail—Reparation.*—An heir possessing under an entail prohibiting the granting of leases with evident diminution of the rental, having let the lands for payment of the former rents and grassums; and the First Division of the Court of Session having, at the instance of a succeeding heir, set aside the leases, as being granted in fraud against the entail; but the Second Division having sustained similar leases; and it being the opinion of a great majority of the Judges, on a remit from the House of Lords, that they were valid; and this being also the prevailing opinion of lawyers and others; and the House of Lords having found that the heir had no power to grant such leases, and the leases having been reduced on that ground;—Held, 1. (reversing the judgment of the Court of Session), That no claim of damages lay against the representatives of the grantor, by the succeeding heir, but reserving his claim for payment of the grassums; and, 2. (affirming the judgment), That the tenants were protected by bona fides from payment of violent profits prior to the judgment of the House of Lords.

March 10. 1824.

1st DIVISION.  
Lord Hermand.

By the entail of the Neidpath or March estate, executed in 1693, it is declared,—‘ That it shall noways be leisome to the said Lord William Douglas, and the heirs-male of his body, nor to the other heirs of taillie respectively above-mentioned, nor any of them, to sell, alienate, wadset, or dispone any of the said haill lands, lordships, baronies, offices, patronages, and others above rehearsed, as well these to be resigned in favours of the said Lord William in fee, as these reserved to be disposed by the said Duke of Queensberry, in manner foresaid, or any part thereof, nor to grant infestments of liferents nor annualrents furth of the same, nor to contract debts, nor do any other fact or deed whatsoever, whereby the said lands and estate, or any part thereof, may be adjudged, apprized, or otherways evicted from them, or any of them, nor by any other

‘manner of way whatsoever to alter or infringe the order and course of succession above-mentioned.’ March 10. 1824.

This prohibition was fortified by the following irritant and resolute clauses:—‘And in case the said Lord William Douglas, or any of the other heirs of taillie a-specified, shall contravene the same, all such facts and deeds shall in themselves be null and void ipso facto, without necessity of any declarator; and the person contravening; and his heirs, shall forfeit, tyne, and amit all right, title, interest, and benefit yt they can any ways acclaim by virtue of the present taillie, and infeftments to follow hereupon, and the said lands and estate shall immediately thereafter descend, appertain, and belong to the next heir of taillie immediately following the contravener, without the burden of all such facts and deeds, in the same way and manner as if the person contravener and his heirs had never existed, or had been no members of this present taillie; and it shall be lawful and competent to the next heir of taillie to serve himself heir to the person immediately preceding the contravener, without the burden of all such facts or deeds, and otherways to establish the right of the said lands and estate in his person, by declarator or adjudication, or any other manner of way agreeable to the laws of this kingdom.’

Then followed a clause as to leases, in these terms:—‘It is always hereby expressly provided and declared, That notwithstanding of the irritant and resolute clauses above-mentioned, it shall be lawful and competent to the heirs of taillie a-specified, and their foresaids, after the decease of the said William Duke of Queensberry, to set tacks of the said lands and estate during their own lifetimes, or the lifetimes of the receivers yrof, the same being always set without evident diminution of the rental.’

In virtue of this entail, William Duke of Queensberry, as Earl of March, succeeded to the estates in 1731. In 1769 he let the farm of Whiteside, forming part of the estate, to the father of the respondent, Murray, for 19 years, at the rent of L.109, and on payment of a grassum of L.132. 18s. 10d.; and in 1775 he granted to him a lease of the farm of Fingland, for 25 years, at the rent of L.50. 10s., and for a grassum of L.480. Again, in 1782, the Duke granted to him a lease of the farm of Flemington, for 6 years, at the rent of L.90, but for which no grassum was paid. The lease of Fingland was renounced by the tenant in 1788, at which time 12 years were to run, and he obtained a new lease of it for 57 years, including also the farms of White-

March 10. 1824. side and Flemington, at a cumulo rent of L.260. 16s. 4d., and for which he paid a grassum of L.400, but which was declared to be for Whiteside and Fingland only. The above rent of L.260. 16s. 4d. was the amount of the old rents payable under the former tacks, with the addition of L.11 for cess, rogue, and bridge money.

The Duke having granted several other similar leases, and particularly one of the lands of Wakefield, for 97 years, and doubts being raised whether he could competently grant leases for so long a duration, he brought an action of declarator against the Earl of Wemyss, and the other heirs-substitutes, in 1804, to have it found that he had power to do so; but the Court, on the 17th November 1807, found that he had no such power, and therefore assolizied the heirs-substitutes.\* In consequence of this decision, an alarm was excited among the tenants on the estate as to the validity of their leases, and they thereupon entered into transactions with the Duke, by which they renounced their leases, and obtained others for such alternative periods as might be sustained by the Court of Session or the House of Lords; and they also insisted that the Duke should place within Scotland a sufficient fund to answer their claims of damages, in the event of their leases being set aside. Accordingly, for this purpose the Duke lent L.50,000 to his agent, Mr Craufurd Tait, writer to the signet, which was secured heritably, and Mr Tait then granted his personal obligation to warrant the leases.

Among others, the father of Murray renounced his lease of the above three farms, and in place of it he received three separate leases,—one to himself of Flemington;—another of Fingland, to his son, James Murray;—and a third of Whiteside, to his other son, William, the respondent; each being granted to endure for the respective lifetimes of the tenants, and for payment of the same rents as under those which had been renounced. Those leases the Duke, and Mr Craufurd Tait as cautioner, granted an obligation to warrant to be valid and effectual.

In 1809, the Earl of Wemyss, who was the next heir-substitute, brought an action of declarator, to have it found, ‘ that it was ‘ not competent to, nor in the power of, the said William Duke ‘ of Queensberry, to set or grant any tacks or leases of any part ‘ of the entailed lands or estate before-written, to endure for a ‘ longer term or period than his own lifetime, or the lifetime of

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\* See Buchanan's Reports, p. 408.

‘ the tenants receivers thereof, except in terms of, and under the provisions of the Act of the tenth of our reign, cap. 51. for encouraging the improvement of the lands in Scotland held under settlement of strict entail; nor to grant any tack of the said lands and estate in consideration of fines or grassums, and thereby diminish the rental; and that all such tacks or leases so granted, either for a longer period than prescribed by the said entail, (unless they are in terms of the said Act of Parliament), or upon payment of grassums by the tenants, are void and null, and shall be of no force or effect in prejudice of the pursuer, as heir of entail aforesaid;’ and there was also a conclusion for damages, the sum of which was left blank. The Duke died in 1820, and the Earl of Wemyss thereafter brought reductions against the tenants, and, among others, against the present respondent, William Murray, concluding that the lease granted to him should be reduced, in respect ‘ that it was ultra vires of his Grace to grant the tack or lease in favour of the said William Murray, defender, the same having been granted in consideration of a fine or grassum paid by the said defender, not without, but with evident diminution of the rental.’

In the meanwhile, one of the tenants, Alexander Welsh, (who had acquired a lease for 57 years, on payment of a grassum), had brought a declarator of its validity, which was remitted to, and conjoined with the general declarator of the illegality of the leases, at the instance of the Earl of Wemyss. On the 25th May 1813, the Court assoilzied the Earl of Wemyss, and the other heirs-substitutes, from the conclusions of the process of declarator by Welsh, and remitted to the Lord Ordinary to hear the respective parties in the general declarator brought by the Earl of Wemyss. The reductions against the tenants having been conjoined with the general declarator, the lease which had been granted to Murray of the farm of Whiteside was one of those which was selected for discussion, and the decision in which was to regulate the fate of the others which were in a similar situation. The Lord Ordinary then pronounced a long and special interlocutor reducing the lease; against which Murray, and the executors of the Duke, having reclaimed, the Court appointed the case to be heard in presence; and thereafter, in reference to the pleas of the parties, pronounced this interlocutor: — ‘ Find, that the entail in question contains a strict prohibition against alienation, but a permission to grant tacks of the said lands and estate during their own lifetimes, or the lifetimes of the receivers thereof, the same being always set without evident

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March 10. 1824. 'diminution of the rental: Find, that in the year 1769, the petitioner's father obtained a tack of the lands of Whiteside for 19 years, at a rent of L.109, for which he paid a fine or grassum of L.132. 18s. 10d.: Find, that in the year 1775, the petitioner's father obtained from William Duke of Queensberry a tack of the farm of Fingland for 25 years, at the rent of L.50. 10s., for which he paid a grassum of L.480: Find, that in the year 1788 he renounced this lease, of which 12 years were to run, and obtained a new lease for 57 of the said farm of Fingland, and also of the farms of Whiteside and Flemington, at the rent of L.260. 10s. 4d., being the amount of the old rents payable under the former tacks, with the addition of the cess, and rogue and bridge money, amounting to L.11 odds, for which he paid a grassum of L.400, which was declared to be for Whiteside and Fingland only: Find, that in the year 1807 the petitioner's father renounced the said tacks, and took new tacks to himself and sons for their lifetimes, at the rents payable under the tacks renounced: Find, that this current tack must be held merely as a substitute for the former ones, and subject to any objections on the ground of grassum, diminution of rental, or otherways, which were competent against the tacks renounced: Find, that in estimating the rents of Whiteside and Fingland, the value of the fines or grassums paid at the commencement of the former tacks ought to have been added to the annualrent: Find, that this was not done, and that the new rent was made the same as the old rent, plus the cess and bridge money: Find, that this was not equal to the value of the grassums taken, and, therefore, that the said last tacks of Whiteside and Fingland were set with evident diminution of the rental, and in violation of the said clause in the entail: Further find, that the conversion of part of the new rent into a fine or grassum of L.400 was to the manifest prejudice of the succeeding heirs of entail, and operated as an alienation pro tanto of the uses and profits of the estate: Therefore, although the said tacks, in point of endurance, do fall within the provision of the entail above referred to, find, that they are struck at by the clause prohibiting alienation, as well as by the condition in the said permissive clause against evident diminution of the rent; and therefore, in the process of declarator, repel the defences; and in the process of reduction, repel the defences, sustain the reasons of reduction, and reduce, decern, and declare accordingly, so far as concerns the said tacks of Whiteside and Fingland.'

To this judgment their Lordships adhered on the 17th November 1815, in so far as regarded the farms of Fingland and Whiteside, but recalled it in regard to Flemington, 'in respect the question concerning the tack of the lands and mill of Flemington was not regularly before the Court at the date of the former interlocutor.'\*

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Against these judgments, Murray and the executors of the Duke entered separate appeals, which were superseded till the opinion of the Court of Session in the Buccleuch cases should be obtained; and thereafter the House of Lords, on the 12th of July 1819, pronounced this judgment in the declarator by the Earl of Wemyss:—'Find, that the said William, late Duke of Queensberry, had not power, by the entail founded upon by the parties in this cause, to grant tacks, partly for yearly rent, and partly for prices or sums of money paid to himself; and that tacks granted by him, upon the surrender of former tacks, which had been granted partly for yearly rent, and partly for prices or sums of money paid to himself, as between the persons claiming under the entail, ought to be considered as set with evident diminution of the rental: And it is ordered, that, with this finding, the cause be remitted back to the Court of Session in Scotland, to do therein as may be just and consistent herewith.' And in the reduction their Lordships pronounced this judgment:—'Find, that William Duke of Queensberry had not power, by the entail founded upon by the parties in this cause, to grant tacks, partly for yearly rent, and partly for a price or sum paid to the Duke himself; and that tacks granted by him upon the renunciation of former tacks, which had been granted partly for yearly rent, and partly for prices or sums paid to the Duke himself, ought to be considered as partly granted for rent reserved, and partly for sums or prices paid to the Duke himself: And the Lords further find, that the tack in question ought to be considered, in this question with the tenant, as granted partly in consideration of rent reserved, and partly in consideration of a price or sum before paid to the Duke himself, and of such renunciation as aforesaid, and as a tack set with evident diminution of the rental: And it is ordered, that, with these findings, the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent herewith.'

At the same time their Lordships affirmed the interlocutors in the declarator at the instance of Welsh.

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\* See Fac. Coll.



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When the reduction and general declarator returned to the Court of Session, a motion was made by the executors, as in the Buccleuch cases, to be allowed to purge the irritancy; but this was refused, and decree of reduction having been pronounced, and Murray having been ordained to remove, the Earl of Wemyss then insisted in his claim of damages against the executors, and violent profits against Murray and the other tenants. As the action of declarator had been instituted during the Duke's life, and it being considered objectionable in point of form, so far as it concluded for damages, the Earl brought a supplementary action against the executors and Murray, in which he concluded for payment 'of the sum of L. 100,000 Sterling, or such other sum as our said Lords shall modify as the loss and damage sustained by the pursuer, by and through the leases granted by the said Duke, and the pursuer's being deprived of the possession of the fair rents and profits of the said entailed estate, in manner foresaid.' This action having been conjoined with the processes of declarator and reduction, the Court, on the 19th December 1822,\* found 'the defender liable in damages or violent profits from the term of Martinmas succeeding the judgment of the House of Lords, dated 12th July 1819.' In pronouncing this judgment,

*The Lord President* observed:—This is a mere question of law, or of legal construction,—and the question is, Whether it was not a point which the executors and tenants were entitled to maintain to the last? I think it was. My own opinion always was, that tacks of extraordinary endurance, or let at grassums, are alienations, and therefore struck at by tailzies prohibiting alienations; and although I don't think that the Court had ever properly buckled with that question till these Queensberry cases, yet had my opinion been asked as a lawyer, I should certainly have said that the contrary seemed to be the general opinion of the Bench, at the Bar, and of the country; and, consequently, though I should have hesitated to advise a party to grant such tack, I should most certainly have advised them to defend them, if granted, to the utmost.

Therefore, how can I blame the Duke, his executors and tenants, for having done so?

I may observe in general, that a doubtful point of law is the most favourable of all cases; because the parties cannot fix that

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\* See 2. Shaw and Dunlop, No. 108.

law, and their own private opinions, one way or another, are of no moment. Take the case of a reduction on the head of deathbed. If the question turn on the mere fact, Whether the disponent was ill of the disease of which he died within sixty days?—that is a fact which the party, though he chooses to dispute it, may well be supposed to know, and therefore to have been in mala fide to hold possession under such a deed, contrary to his own knowledge. But suppose the question to turn on a point of law, such as, Whether the day of signing the deed, or the day of the death, are to be counted within the sixty days?—or whether a man under a challenge to fight a duel is to be held on deathbed?—or whether going to a seceding meeting-house is to be held a going to kirk?—or going to the market-place on a particular day, (as the case of the fish-market at Aberdeen), is to be held as a going to market?—all these points, if not fixed by previous decisions, are fair debateable points, where there is hardly room for a question of bona fides before a final decision.

So, on the construction of a deed, whether a particular subject is carried by it, *e.g.* the lime and stone-quarries in Duchess of Roxburgh's locality, where the Court found, that though these did not fall under her disposition in locality, yet her locality was so colourable a title, and it was so natural in her to suppose that they did fall under it, that the Court refused to order her to account for the rents and profits she had drawn during the time she had possessed them.

This was nothing but an error juris, which, although it will not protect against the restitution of the subject, is sufficient to protect against restitution of the fruits reaped under that error. Now, under the judgment of the House of Lords, putting their decision solely on the want of power, this is nothing but an error juris, arising out of the misconstruction of a deed, and affording, therefore, a colourable title of possession till finally reduced.

And so the Court has found, in the case of Sir William Elliot v. Potts, 22d May 1822, where we refused a petition without answers, against an Outer-House interlocutor, finding a tenant, in a similar case, liable for full rent only from the date of the judgment of the House of Lords. It is true that, in that case, our judgment had been in favour of the tenant, which may be said to have confirmed his bona fides, till he was taught better by the House of Lords; while, in this case, our judgment was against the tenant, which therefore should have put him in mala fide.

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March 10. 1894. But, really, in so new a case, and where a judgment of the Second Division stood the other way, I cannot lay any weight on this distinction. Therefore, without going into the distinction between damages as against the executors, and violent profits as against the tenants, or between bona fides and mala fides, I think this was a doubtful point of law, which both were warranted to contend to the last.

*Lord Hermand.*—The tenants were in bona fide for a certain period, and your Lordships will determine the time when they began to be in mala fide. It is impossible to say that the Duke was in mala fide to grant, or the tenants to receive the leases upon grassums. Although it was held by lawyers generally, that an heir of entail was entitled to take grassums, it is said that they must be liable for the violent profits from the date of citation. I do not think so; neither do I think that they can be liable from the date of the judgment of this Court, because an opposite judgment had been pronounced in the Second Division; and when the opinions of the whole Judges were taken, ten were in favour of the leases, and therefore the tenants were in bona fide to believe that they were effectual. If not so, on what principles are men to act? Are Judges alone entitled to indemnity for mistaking the laws? I apprehend not; and therefore, that the damages, or violent profits, can be due only from the date of the judgment of the House of Lords.

*Lords Succoth, Balgray, and Gillies*, concurred.

Both parties then appealed,—the Earl of Wemyss contending that he was entitled to damages, or violent profits, from the period of his succession to the estate;—and the executors and Murray, that an action of damages was not competent against them, and that at all events they were protected by bona fides from any claim whatsoever. In support of these pleas the same argument was maintained as that which was urged on the part of the Duke of Buccleuch in the question relative to the Queensberry estate, with this difference, that the Earl of Wemyss endeavoured to make out a specialty from the circumstance of the tenants having stipulated for and obtained security in the event of their leases being set aside, which, he alleged, indicated such a degree of doubt in their minds as was exclusive of the plea of bona fides; and besides, that the leases had been found, both by the Lord Ordinary and by the Court, to be ineffectual. To this it was answered, that the leases had been set aside by the House of Lords simply on the ground that Duke William had no power to grant them upon grassums, as to which there had been a gene-

ral and prevailing mistake in Scotland, and under the influence of which the parties had acted bona fide. March 10. 1824.

*The Lord Chancellor*, in the course of the pleading at the Bar, observed,—Fraud may be stated in the summons, ~~but originally~~ neither the Court of Session nor ~~this~~ House proceeded on grounds of fraud, but on the nullity from want of power. Still it is open to you to plead fraud now; but it has not been proceeded upon in the Court below at all. I, however, now say, that I shall never admit that it is not competent for this House to take into consideration any points stated in the summons. At the same time, with reference to Vans Agnew's case, I must say that not a word was stated at the Bar on this point. The judgments given here may not negative fraud, but yet nothing was done upon it in the Court below. Again his Lordship asked, Am I to understand from the judgments of the two Divisions of the Court, that what are called violent profits, and what again are called damages, mean the same thing?

*Jeffrey*.—There is some looseness in the expressions used, but certainly they mean the same thing.

The House of Lords ordered and adjudged, ‘ That the interlocutors complained of in the cross appeal, so far as such interlocutors maintain any demand against the appellants for damages, be reversed; reserving entire to the respondent any claim which he may be advised to make against the appellants with respect to the whole, or any part of the grassums taken and received by the late William Duke of Queensberry from his tenants; and reserving also to the appellants their defences, as accords. And with respect to the said original appeal respecting the tacks under which the respondent, William Murray, claimed, and which were reduced upon the grounds expressed in the judgment of their Lordships of the 12th July 1819, it is further ordered and adjudged, That the interlocutor complained of, so far as the same is complained of, be affirmed, with like reservation as to any demand of the appellant against the respondents, the executors of the Duke of Queensberry, in respect to the whole, or any part of the grassums taken and received by the late Duke of Queensberry from his tenants; and reserving also to the respondents, the executors of the Duke of Queensberry, their defences, as accords.’

*Appellant's Authorities*.—2. Ersk. 1. 25.; 2. Stair, 1. 22.; 1. Bank. 8. 12.; 1. Stair, 7. 12.; 2. Stair, 12. 7.; 2. Stair, 1. 24.; Cockburn, Feb. 12. 1679, (1732.); Agnew, July 15. 1746, (1732.); Agnew, July 31. 1822, (ante, Vol. I. p. 333.); Cunningham, Feb. 19. 1835, (1738.); Gray, Feb. 23. 1672, (1751.); Milne,

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March 10. 1824. July 19. 1715, (1759.); Oliphant, Nov. 30. 1798, (1721.); Wedgewood, June 13. 1820, (not rep.); Duke of Athol, June 20. 1822, (2. Shaw and Dunlop, No. 560.); See also authorities in Queensberry Cases.

*Respondents' Authorities.*—2. Ersk. 6. 54.; Stair, p. 338.; 2. Bank. p. 117.; 2. Craig, 9. 5.; Inst. de Rei Div.; 1. Ersk. 1. 28.; Stair, p. 76. 176.; 1. Bank. 213.; 2. Ersk. 1. 25. 29.; Lealie, Feb. 13. 1745, (1723).; Gordon, Dec. 1. 1757, (Elchies, voce Tailzie, Aff. March 24. 1760.); Grant, Feb. 9. 1765, (1760.); Laurie, June 21. 1769, (1764.); Duke of Roxburgh, Feb. 17. 1815, (F. C.); Turner, March 3. 1820, (F. C.); Bonny, July 30. 1760; (1728.)

SPOTTISWOODE and ROBERTSON—J. RICHARDSON—J. CHALMER,—  
Solicitors.

(*Ap. Ca. No. 34.*)

No. 12. EXECUTORS of WILLIAM Duke of Queensberry, Appellants.—  
*D. of F. Cranstoun—Moncreiff.*  
WILLIAM SYMINGTON, Respondent.—*Whigham.*

*Warrandice—Reparation.*—An heir in possession under an entail, who was uncertain as to the extent of his powers in granting leases, having, on payment of a grassum, granted one for 31 years, or such other period as it should be found he had power to do; and having warranted the possession for 31 years, and the leases having been set aside as ultra vires;—Held, (affirming the judgment of the Court of Session), That the representatives of the granter were bound, under the warrandice, to make reparation.

March 10. 1824. In 1792, Robert Symington, the father of the respondent, obtained from William Duke of Queensberry a lease of the farm of Edstoun, forming part of the Neidpath estate, for 57 years, at a rent of L.155. 7s., and for payment of a grassum of L.300. In consequence of the terms of the entail,\* and the decision in the Wakefield case, doubts having been entertained of the validity of this and the other leases, an arrangement was entered into, by which, among others, Symington renounced his lease, and obtained a new one for 31 years, or for several alternative periods, down to 19 years, according as the Duke should be found to have powers to grant tacks under the entail. By this new lease, the Duke as principal, and his agent, Mr Craufurd Tait, as cautioner, bound and obliged themselves, that 'in case it shall be found that the said Duke has not power to grant the present lease for a term of 31 years, and that the same shall only subsist for one of the afore-

1st DIVISION.  
Lord Alloway.

\* See ante, p. 70.

‘ said shorter terms or periods, so that the said Robert Symington, his heirs and assignees, shall only enjoy the subjects hereby let under this lease for 29 years, or 27 years, or 25 years, or 21 years, or 19 years, from Whitsunday 1807, instead of enjoying the same in full for 31 years from that term, then and in that case, besides warranting this lease for the term of endurance or period of years for which he has power to grant it, and for which in such case it is granted, to make up and pay to the said Robert Symington, his heirs and assignees, the difference between a tack for the shorter endurance for which this tack may be sustained, and a tack for the full term or period of 31 years from Whitsunday 1807, or the damages he or they may sustain by getting a tack only for the shorter period for which this tack may be sustained, in place of a tack for the full period of 31 years from Whitsunday 1807, in the same manner as if they warranted this present tack absolutely as a tack for 31 years from and after the term of Whitsunday 1807.’

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After the death of the Duke, a reduction having been brought of this and the other leases by the Earl of Wemyss, the First Division of the Court of Session, for special reasons, some relating to the powers of the Duke, and others to fraud upon the entail, reduced the lease; and on appeal to the House of Lords, their Lordships found, on the 12th July 1819, ‘ that the said Duke of Queensberry had not power, under the entail founded upon between the parties in this cause, to let tacks partly for rent reserved, and partly for sums and prices paid to himself; and that tacks granted upon the renunciation of former tacks, which were made partly for rent reserved, and partly for sums and prices paid to the Duke himself, are to be considered as tacks made partly for rent reserved, and partly for sums and prices paid to himself; and that such tacks are not to be considered, in questions between the parties claiming under the entail, as let without evident diminution of the rental; and it is ordered, that with this finding the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with this finding.’

In consequence of this judgment, this and the other leases were reduced, and the tenants were found liable in damages or violent profits, from and after the date of that judgment.

As mentioned in the preceding cases, Duke William had left two sets of executors, one in England, and the other in Scotland; the former of whom had placed his funds in the Court of Chancery, and issued advertisements, calling upon all those who

March 10. 1824. had claims on these funds to appear in that Court. In consequence of this, Symington lodged a claim for L.7000, as being the damages which he would sustain in the event of his lease being set aside; and thereafter, the respondent, William Symington, the son of Robert, having acquired right to the lease, brought an action against the executors in Scotland, libelling on the above clause of warrandice, and concluding for payment of such damages as 'the pursuer will sustain by and through the reduction of the said tack or lease, and by and through his being now to be deprived of his possession under the same, at the term of Whitsunday next, in place of enjoying the same for the full period of 31 years from and after the term of Whitsunday 1807, whereby he will be deprived of 17 years' possession; and which he has sustained or may sustain, by endeavouring to maintain himself in possession, against the challenge of the said Earl of Wemyss and March;' and further, concluding for relief of the claim for violent profits which had been made by the Earl, and had been sustained by the Court of Session.

In defence against this action the executors maintained,—

1. That as Symington had made the very same claim in the Court of Chancery as that for which he concluded in this action, he was barred by the plea of *lis alibi pendens*.

2. That the clause of warrandice was not of an absolute, but of a limited nature, having reference to the period for which the Duke had power to grant leases; and being therefore limited by the extent of the Duke's powers, it could not be the ground of an action of damages founded on the fact that the Duke had no power to grant the lease. And,

3. That as the entail was made under the authority of the statute 1685, and was duly published, it was equivalent to a local statute, prohibiting certain things being done on the estate; and as it had been decided that the lease was made in violation of that prohibition, and as both parties were equally sharers in that illegal act, no action founded on that act could be maintained by Symington against them for reparation.

The Lord Ordinary found damages due, and also that the executors were bound to relieve Symington of the claim by the Earl of Wemyss; and on advising a representation, his Lordship, on the 30th November 1822, pronounced this interlocutor:—*1mo*, With regard to the plea of *lis alibi pendens* in the Court of Chancery, finds, that this cannot be a bar to the present proceedings, seeing, *1st*, That the claim made in the Court of Chancery by the respondent and the other tenants, was lodged

‘ in consequence of advertisements in the newspapers, desiring March 10. 1824.  
 ‘ all parties who had any claims against the late Duke of Queens-  
 ‘ berry to lodge the same with the Master, and was done solely  
 ‘ with the view of acquainting the Master with the amount of the  
 ‘ existing claims, so as to limit the sums to be paid to legatees,  
 ‘ or those in right of the reversionary interest, to the surplus of  
 ‘ the estate beyond these claims : *2dly*, That this claim arises out  
 ‘ of a clause of absolute warrandice, contained in a contract with  
 ‘ regard to heritable subjects in Scotland, and which must be  
 ‘ constituted in Scotland before the claim could receive effect in  
 ‘ the Court of Chancery : and, *3dly*, That the respondent claims  
 ‘ his relief not only from the heritable and moveable estate of the  
 ‘ late Duke of Queensberry situated in Scotland, but also from  
 ‘ Mr Tait, as his cautioner, upon the same warrandice ; and  
 ‘ payment from the Duke’s heritable subjects, or from Mr Tait’s  
 ‘ subjects, all of which are situated in this country, cannot be  
 ‘ obtained without a decree pronounced by the Courts here.  
 ‘ With regard to the *second* plea, finds, That by the clause in  
 ‘ question the Duke of Queensberry, for whom the representers  
 ‘ act as trustees and executors, granted the most absolute and  
 ‘ effectual obligation of warrandice known in the law of Scotland,  
 ‘ upon which the respondent, on the lease being evicted from him  
 ‘ through any defect in the right, was entitled to claim relief  
 ‘ from any estate or property held by the late Duke, and liable  
 ‘ for payment of his debts and obligations. And with regard to  
 ‘ the *third* plea, finds, That there is nothing in the statute 1685  
 ‘ which can prevent the operation of a clause of warrandice,  
 ‘ granted in a lease by an heir of entail, affecting any of his other  
 ‘ property not entailed, or which can prevent the person, whose  
 ‘ right under that lease has been evicted, from claiming relief,  
 ‘ either from any separate estate belonging to the granter of the  
 ‘ obligation of warrandice, or from the cautioner for that warran-  
 ‘ dice, provided it does not affect the heirs of entail nor the en-  
 ‘ tailed estate. And therefore refuses the representation, and  
 ‘ adheres to the interlocutor complained of.’ The Court, on the  
 29th January 1823, refused a petition without answers.\*

The executors having appealed, the House of Lords ‘ ordered  
 ‘ and adjudged, that the several interlocutors complained of be  
 ‘ affirmed, without regard to the findings of the Lord Ordinary  
 ‘ of the 30th November 1822, and adhered to in the subsequent  
 ‘ interlocutors, with respect to which the Lords do not find it

\* See 2. Shaw and Dunlop, No. 150.



March 10. 1824. ' necessary to give any opinion; and it is further ordered, that  
' the appellants do pay to the respondent the sum of L. 200 for  
' his costs.'

(*Ap. Ca. No. 30.*)

LORD CHANCELLOR.

MY LORDS,—Your Lordships have heard at your Bar most ably argued several appeals relative to the leases upon the Queensberry estate, and likewise several appeals relative to the leases on the Neidpath estate. With respect to the appeals upon the Queensberry estate, the first is an appeal which has been brought by the Duke of Buccleuch and his curators, appellants, and John Hyslop, tenant of a farm called Halscar, and the executors and trust-disponees of the late Duke of Queensberry, the respondents. The second is the case of the Duke of Buccleuch and Queensberry and his curators, appellants, and the trustees and executors of the late Duke of Queensberry, respondents. The third case in respect of the Queensberry estates, is the case of the executors and trustees of the late Duke of Queensberry, appellants, and John Hyslop, tenant in Halscar, respondent.—With respect to the Neidpath appeal, the first is the case of the Earl of Wemyss and March against the executors and trustees of the late Duke of Queensberry, respondents. Then there is a cross-appeal of the executors and trustees of the late Duke of Queensberry against the Earl of Wemyss and March, respondent; and lastly, an appeal of the executors and trustees of the late Duke, and Tait and Russell; appellants, and William Symington, late tenant in Edetoun, respondent.

There is one appeal, in its nature common to both, upon which it can be hardly necessary to trouble your Lordships with more than a single word; I mean that from the judgment with respect to the relief of the tenants, because it appears that the leases that were made contained an express clause of relief as to the tenants. It cannot therefore but be, that if the tenants do not enjoy the benefit of their leases, they have a right to recover the value of what they ought to enjoy against the estate of the late Duke of Queensberry; and that is all that I think it necessary to state with respect to those cases. With regard to the other cases, it becomes necessary,—not, I apprehend, with a view to conformity to the usual practice of your Lordships in giving judgment, the opinion I have formed being that which I am about to express, but in consequence of some differences of opinion that appear to me to have obtained in the Courts below,—to trouble your Lordships with a few words, before I offer in substance my humble opinion as to what ought to be done in these cases.

My Lords,—In the case of the Queensberry estate the summons is this:—They pray to have it found, that those leases respectively were

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invalid and reducible, as in contravention of the entail, and ultra vires of the granter; and that the several defenders should be ordained to remove from their respective possessions, and also to make payment to the pursuer of the sums in sterling money, such as should be found 'to be the yearly worth and value of the lands, and that for the crop of the year 1811, and the like sum for every subsequent year during which the defender might continue to possess the lands.' That is the nature of the summons in that case. In the Neidpath case the summons goes farther, for that summons is, that the said William Duke of Queensberry, and the 'tenants and possessors of the said tailzied lands and estate to whom the said tacks and leases have been granted, defenders, ought and should be convened before our Lords of Council and Session; and it ought and should be found and declared, by decree of our said Lords, that it was not competent to, nor in the power of the said William Duke of Queensberry, to set or grant any tacks or leases of any part of the entailed lands and estate before-written, to endure for a longer term or period than his own lifetime, or the lifetime of the tenants receivers thereof, except in terms of and under the provisions of the Act of the 10th of our reign, chap. 51. "for encouraging the improvement of lands in Scotland held under settlements of strict entail," nor to grant any tack of the lands and estate, in consideration of fines or grassums, and thereby diminish the rental; and that all such tacks or leases so granted, either for a longer period than prescribed by the said entail (unless they are in terms of the said Act of Parliament), or upon payment of grassums by the tenants, are void and null, and shall be of no force or effect in prejudice of the pursuer as heir of entail.' Then there was a supplementary summons against these respondents, that they ought to make payment to the pursuer of a sum sterling, or such other sum as our Lords shall modify, as the damages sustained, or which may be sustained, by and through his illegal and unwarrantable granting of the leases.'

Your Lordships therefore observe, that one summons requires only to have the yearly worth and value of the lands; the other requires, as a compensation in damages, a sum which might go a good deal beyond the yearly worth and value of the lands. But it has been admitted at your Lordships' Bar, that the object in all these proceedings is simply that either the tenants or the executors should pay the yearly worth and value of the lands; the Duke of Buccleuch contending, that that yearly worth and value should be computed during a period and through a period antecedent to that which the Court of Session held to be the right period from which such increased worth or value should be computed.

In the case of the Queensberry leases, after a great deal of litigation, the particulars of which it is quite unnecessary to state to your Lordships, who have heard so much from the Bar, not only upon this hearing, but repeatedly upon former occasions, it is enough to say, that

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the Second Division of the Court of Session held these leases to be good, in two consecutive judgments. This House was of opinion they were bad; and bad, upon the ground that grassums had been taken, and that they were let in diminution of the rental. In the case of the Neidpath leases, the other Division, that is, the First Division of the Court of Session, were of opinion, without reference to the question how far the endurance of that particular lease would make them bad, that the grassums being taken, the leases were therefore bad; but though that was held, it was so decided by what is termed the narrowest majority, three Judges being of opinion, that taking the grassums made the leases bad, two of the Judges being of opinion that the taking those grassums did not affect the validity of the leases: and it is to be observed, that your Lordships thought proper to remit the consideration of this branch of this most important question to the Judges of the Court of Session, requiring the Judges to whom you made the remit to take the opinion of the whole of the Judges; and as to the whole of the Judges, their opinion, when taken, stood thus:—ten of them were of opinion that taking of the grassums did not affect the leases; five of them were of opinion that the taking the grassums did affect the leases. When the matter came back to this House, your Lordships agreed with the five; and were of opinion that the ten were wrong.

My Lords,—In the course of the proceedings which have taken place before your Lordships, a very able and powerful address was made to your Lordships, certainly by a very able and accomplished man—I mean the present Dean of Faculty—exhorting your Lordships to take care how you introduced English law into Scotch cases. My Lords, I have, in all that it has been my duty to do here, professed always the desire not to introduce English law into decisions upon Scotch cases, in judgments which we give in this House. We ought to consider ourselves sitting here as in truth the Court of Session, to dispense Scotch law, and Scotch law only; and it is impossible for the person who has now the honour to address your Lordships not to admit, that he never did discharge a more painful duty in his life, than when he stated to your Lordships the conviction of his mind that these leases were bad on account of the taking of grassums, not founded on any speculative notions that such leases should not have been supported by the law of Scotland, if that law did support them—not upon any notions derived from the law of England, but upon what he was fully persuaded was actually the law of Scotland.

I am very far from having the presumption to suppose that I was necessarily right in that opinion. I have, however, always felt it to be my duty, after endeavouring sedulously to inform myself upon subjects which come before us for judgment, firmly to deliver my opinion, attending to the responsibility which rests upon me in matters of such importance. It was with great regret that I found myself obliged so to determine in cases which have imposed, I fear, hardships

upon the owners of entailed estates in Scotland, such as are hardly to be endured, and from which I trust some relief will be given to them. I so say, in consequence of the information which I have received with so much satisfaction from the individual to whom I have before alluded, that he has this matter under his consideration, with a view to proposing some declaratory law as to the powers which persons having entailed estates ought to have; and whenever your Lordships shall have brought under your consideration that measure, it is my humble wish that those who have found that they have not the powers which they conceived they had, may be considerably relieved by the effect and operation of such law as may then be passed.

My Lords,—The leases themselves being held to be null and void, another question of course was this, viz.—from what time the tenants should be liable to pay, not the reserved rents, (the reserved rents being formed upon the principle that they ought to be much less than the yearly worth, because grassums were paid),—from what time they should pay what was the yearly amount and value of the lands they occupied. Another question arose, viz. not only whether the tenants were liable for bygone profits, but whether the executors and trustees of the Duke of Queensberry were also liable for improved rents. The liability of the trustees and executors to indemnify the tenants being quite clear, they are indirectly liable. The question is, whether, according to the Scotch law, a direct demand could be made by the land-owner against the executors and trustees themselves. And upon those two points, I take the judgments given by the different Divisions of the Court of Session to stand thus,—that with respect to the Queensberry estates, the tenants are liable from Martinmas 1819, which is the first day of payment subsequent to the last decision of the House of Lords—that decision which determined that those leases were bad. In the Neidpath estate, they have also determined that the tenants are liable from the same period; but there is this difference between their judgments, viz. that in respect to the Queensberry estates, there is nothing said in the interlocutor of the Court of Session appealed from, with respect to the liability of the executors and trustees, except what is said upon the question, how far those executors and trustees may be liable to account for any and what part of the grassums that were taken. In the Neidpath estate case, on the other hand, the action against the tenants and against the executors was conjoint, and the First Division of the Court, as I understand the interlocutor, held both the tenant and executors to be liable; that is, not both of them to pay the whole of the full rent, but each of them so liable that the whole of it shall be paid;—the decision in the Queensberry case going upon this, that the executors and trustees may be liable, with reference to the grassums, according to the principles of the law of Scotland, founded as they say on the civil law, the Duke of Queensberry having become locupletior by receiving the grassums. But they have given no opinion upon whether they are so liable,—that point being

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March 10. 1824. reserved by their interlocutor for future consideration. As they have given no opinion upon the point, whether the executors are liable, in that respect the case is not before us at present so that we can determine how that consideration shall be finally disposed of. For though this House has power to dispose of the whole, if it thinks proper to dispose of the whole, I believe, except when taken by surprise and inadvertence, this House has been extremely careful, as most assuredly it ought to be if it means to preserve the law of Scotland, to be informed what is the judgment of the Court below upon each point, before it ventures to give its own opinion. That must therefore be considered as a point still reserved.

In the course of the hearing I took the liberty of inquiring, whether the reservation of that point was a reservation likely long to affect the division of the fund which will be to be distributed among the creditors and residuary legatees of the late Duke of Queensberry. It was very satisfactory to me to hear that the amount of the grassums was such as could be very easily ascertained, and therefore that that reservation threw no difficulty in the way of settling so much of the divisible fund as it may be necessary to set apart, in order to satisfy the claim on the other part of that divisible fund now in the Court of Chancery.

With respect to the Neidpath estate, your Lordships observe there is this difference, that with respect to it, where the actions were conjoint, the Court held both the executors and the tenants to be directly liable for the full rents;—whilst, in the Queensberry case, it is held that the executors may possibly be liable for the whole or a part of the grassums, but that they can be liable for no more: That the tenants have a relief against the executors in respect of their liability under the warrandice contained in the leases; but, on the other hand, that the executors are not directly liable for the increased yearly value or the rent of the lands.

Having disposed, in the very few words I have stated, of the appeals against the tenants with respect to their relief, namely, that it is quite clear that if the tenants are bound by law to pay, having had the covenant of the late Duke of Queensberry for their relief, the effect of that covenant must be given to them, and that whatever they are subject to, contrary to his engagement as to what they shall be subject to, must be recouped to them out of his general assets; the questions then are reduced to these:—First, Whether the Second Division of the Court of Session is right in saying that the tenants are liable only from Martinmas 1819, which is immediately after your Lordships' last interlocutor, and the executors liable not at all, except in respect of the grassum; and whether, in the other case, the decision of the First Division is right in saying that the tenants are liable from Martinmas 1819, but holding the executors both directly liable to indemnify the tenants, and directly liable to the substitutes in the entail from that period. My Lords, My humble opinion, after considering this case, (and really I must admit, after combating with and putting down what

appeared to have been prejudices upon this subject); my humble opinion is, that, with respect to the demand upon the tenants, that demand cannot be made at any period farther back than Martinmas 1819 in either of the cases; and my humble opinion also is, that though the tenants had a right of relief against the executors and trustees, the executors and trustees themselves are not directly liable to the demand of the substitutes. March 10. 1824.

My Lords,—It certainly strikes me that it is very extraordinary that there should have been an enjoyment against the right for so long a period in both cases as there has been here, and yet that an intermediate fair rent should not be accounted for—a rent in some degree settled with reference to the yearly worth and value of the premises occupied. This surprise perhaps was generated by what one knows to be the case with respect to English estates. Your Lordships perfectly well know, with respect to them, that when you have recovered the possession, you can go back to a certain period, but it is only to a certain period, to recover rents and profits which have been withheld. But I am not quite sure that, if we trace our own law back, we shall not find in it originally very much the same position with respect to past rents and profits as there was in the civil law. I do find it stated in our books, with respect to real actions, that past rents and profits could not be recovered; and there is a remarkable expression touching this in our books, to this effect,—that this was ‘because till the determination was made, nobody could say that there was a wrong.’ It was by statute that, in many cases, the right to recover damages which were measured by the worth of the thing which had been enjoyed,—it was by statute that that right was given; and then the Legislature of this country found, that if they gave a right to recover damages for the time past, without limitation for how long past, they would put persons into a situation of hardship that was quite intolerable; and they would, on the other hand, permit persons to be as negligent of their own interests as to the time of making their demands as they pleased to be, thereby inflicting on those enjoying without suspicion that they were enjoying against right, all the hardships of having to make good the fruits of the estate which they had, under mistake, and led on by that negligence, consumed and enjoyed.

Now, my Lords, looking to the law of Scotland, and to the various cases that have been stated to your Lordships, (and they have been many, very many in number), it appears to me that this observation is not unfair, viz. that if you have once established what is the principle by which the Court means to decide in those cases, there is not a great deal of use in examining the circumstances of each case. In this infinite number of cases, there are some of them in which the application of the principle has been made to circumstances which you may perhaps think do not authorize such an application of it. In other cases you may think the application of the principle has been right. If the principle is acknowledged in every case, many cases

March 10. 1824. may appear to have been ill decided, and many may appear to have been properly decided, to those who reason differently upon the effect of circumstances, but who all mean in decision to uphold the principle itself. It does appear to me, after looking at all those cases, that the law of Scotland,—that law which I say your Lordships are bound to pronounce here,—that the law of Scotland is this, that until you can say that the person against whom the demand is made is in resisting it in mala fide, he shall not be held amenable for the fruits he has enjoyed and consumed.

My Lords,—The question therefore comes round to this, as it appears to me, in the circumstances of the present case, When is it you are to say that these persons were in mala fide—that they were no longer in bona fide? Now, my Lords, as to that, it has been argued, that they ceased to be in bona fide because they were enjoying under leases that were null and void. My answer to that is, that it is not the law of Scotland, unless you can see from the circumstances of the case, not only that the leases were null and void,—not only that it was doubtful whether they were null and void,—but unless you can see from the circumstances of the case that the tenants might be affected, and the executors affected with what is termed in those Cases the *conscientiæ rei alienæ*. Now certainly, my Lords, I must be the last man in the world to say that I can accede, after what I have stated to your Lordships of the feelings which dictated my judgment in 1819 on the grassums,—I must be the last man in the world, in respect of the Queensberry estates, to say that the tenants were in mala fide originally, or that the Duke of Queensberry was so in mala fide. That the Duke meant to get out of this estate every thing which he conceived to be his right,—that he meant to get out of this estate every thing which he was advised he could according to right get out of the estate, is most true: that he meant that nothing should go to the substitutes of entail, which he, as he was advised as to his legal rights, could withhold from them, is certainly true. But though a man's determination by himself, and himself only, to enjoy all he has right to enjoy, may be quarrelled with in some views, it cannot be quarrelled with, as it should seem, according to Scotch law, if he had strong reasons for believing that he had the right which he was advised belonged to him, though it should finally turn out that his supposed right stood upon grounds, which, however debateable, would not finally be established in judgment. It appears to me, that to say the Duke has made leases which are null and void, amounts to nothing material.

Let us look at the Queensberry case, and let us look at the Neidpath case. They are different in this respect:—In the Queensberry case, every judgment of the Court of Session was a judgment in favour of the Duke of Queensberry's leases: In the Neidpath case, as I have before stated to your Lordships, the first judgment was against the leases by what is called the narrowest majority. When the Queensberry cases came up to this House, and when the Neidpath cases came

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likewise up to this House, your Lordships were so little able at that time to say that this was the clear law upon the subject,—you were so little of opinion that you could say this was a law which must be understood to be known to all the lieges in Scotland, or even to the learned Judges of Scotland, that you professed yourselves unable to determine what was the law upon the subject; and you made remits which called for the conjoint opinions of all the fifteen Judges of that part of the kingdom. Their opinion was in the proportion, taking numbers as I have mentioned, of ten to five that those leases were all good. Your Lordships were ultimately of opinion certainly that the leases were bad. But it is a very strong thing to say that a man was in *mala fide* who was seeking to enjoy leases that ten of the Judges of the land thought good, and that five of them, for the first time probably, thought to be bad. It is impossible to deny that, although ransacking through all which had passed in the law of Scotland, as that law is recorded, in respect to the taking of grassums, your Lordships were finally of opinion; that the taking of grassums affected the leases,—it is quite impossible, I say, to hold that that was an opinion consistent either with the judicial sentiments of all the existing Judges, or consistent with the judicial sentiments of many of their illustrious predecessors: That I am ready to admit. Well then, under those circumstances, how is it possible for me to say that there was a *mala fides* on the part of those who had been acting under the best advice they could obtain in the country where the property was, and where the thing had gone on in the way this had gone on.

My Lords,—If your Lordships look at the several cases which have been decided, you will find that the periods from which the computation is made, of what they call violent profits, which they are desirous to consider as the value of the land, have been very different. There have been cases where the violent profits have been given from the first interlocutor, and others in which they have been given from the summons or from the citation; but those were cases in which the circumstances made it a case of *mala fides* to hold on against what was stated and represented in the summons. But when we come to consider what was doing contemporaneously upon the Queensberry estate and the Neidpath estate,—true it is that three Judges out of five in the First Division were of opinion that the leases were bad,—all the Judges of the Second Division were of opinion they were good; the House of Lords joined the Neidpath case in the remit to the Queensberry case, and upon that you had the opinion of the ten against the five;—you have also had antecedent opinions, not strictly speaking judicial opinions, but very weighty opinions; I mean the opinions of great lawyers who had before lived, and who, as trustees of entailed estates in Scotland, had made many such leases as leases that were good,—I really cannot see that there is any substantial difference on the question of *mala fides* and *bona fides* between the Queensberry leases and the Neidpath leases. That being so, my Lords, it remains only for me,



March 10. 1824. upon this branch of the case, to state my very humble opinion, that the judgments which found the tenants liable from Martinmas 1819 are good in both cases.

My Lords,—With respect to the other question which arises, Whether the executors were directly liable to the substitutes of entail? —I confess that I am satisfied by the reasoning I have read, and the reasoning I have heard, that the executors are not directly liable to the substitutes of entail. But supposing the executors were liable together with the tenants, I cannot myself see how it is to be made out, that if the tenants are to be considered as in bona fide till Martinmas 1819, the executors were in mala fide in continuing to accept reserved rents from those tenants till Martinmas 1819. It is very true, that after that interlocutor, and after the judgment of this House, the tenants could no longer claim to hold at the reserved rents, because the leases were void. Then comes the question, Whether the executors were directly liable for that loss and damage which has constituted the difference between the reserved rent and the yearly worth and value from Martinmas 1819 till the tenants were removed from the estate, and another loss and damage which may be constituted by the expense belonging to the suit for removing the tenants? Now, my Lords, with reference to this, in the first place, where there has been an entail under the Act of 1685, we have it as an admitted fact, that down to the year 1824 no such action has ever been maintained. And when you come to consider the situation and circumstances in which the owner of an entailed estate in Scotland stands, namely, that if he contravenes only for a single acre of land, having a property we will say of L.10,000 a-year, he forfeits the whole under that statute; I can easily conceive why it has been long thought enough, that he should forfeit the land and not also be liable in damages. My Lords, the fact that no such action has ever been brought,—the fact that you have a remedy against the actual possessor, the tenant, and that the tenant's means will be supplied in general cases by the responsibility of the landlord to indemnify the tenant,—considering this, and the general reasoning to be found in the Cases on your table, and in the judgments of the Judges in the Court below, I am of opinion, that there is no direct remedy against the executors, unless it be in respect of the reservation which is contained in the Queensberry case, and which is not contained in the Neidpath case,—I mean the reservation upon the ground that the Duke of Queensberry became locupletior by receiving grassums. The interlocutors, therefore, affecting them directly must be altered; but with a reservation alike to that in the Queensberry case respecting grassums. Whether that reservation will finally establish any demand against the executors, is a question upon which I do not intimate any opinion to your Lordships, whatever my apprehension may or may not be about it. I think it would be a very dangerous thing for us to meddle with it at all, until the Court of Session shall have decided upon it.

I have troubled your Lordships with these views of the cases, for the purpose of shewing, that in the judgments we pronounce, we must, by proper language, have due attention to the circumstances I have pointed out, as forming differences in the interlocutors of the respective cases. March 10. 1824.

I shall trouble your Lordships no further than by saying, that if there is a desire which, with respect to such a subject as this, an Englishman may be supposed most anxiously to entertain, it is, that from the difficulties in which the agitation here of the Duntreath case and these Queensberry cases have placed the owners of entailed estates in Scotland, they may be relieved by some law that shall let them know what their rights are; for I certainly do agree with what has been stated from the Bar, that it is very difficult for the owners of an entailed estate in Scotland, with prohibitory, irritant, and resolute clauses, to know what he may do for his creditors or his family. The Duntreath case was a case which, according to Mr Cranstoun's account of it, has let the law of Scotland loose,—it is a case in which, speaking my humble opinion, it would have been impossible that I could have concurred in the judgment which held the institute not to be an heir of tailzie; when, if the institute is not an heir of tailzie, there is not one word in the statute of 1685 that authorizes you to bind him at all by the prohibitory, irritant, and resolute clauses; and when in that very instrument, in every clause of it, the words had occurred, 'the said Thomas such a one, and the other heirs of tailzie,' the institute being described by his name, and the heirs of tailzie described as 'the other heirs of tailzie;' yet it was found that he was not an heir of tailzie. Your Lordships were informed at the Bar, that from that construction here of that entail, there had been inferences and conclusions drawn which appear to have led to the greatest part of the difficulties which now rest upon the owners of entailed estates in Scotland.

Upon the whole, my Lords, my humble opinion is this, and that opinion I should recommend to your Lordships should be embodied in proper form in a judgment, which may be laid before the House the next day we meet, unless any noble Lord differs from me,—that the computation of bygone rents and profits, with respect to the tenants, should be from Martinmas 1819,—that the executors are liable to the relief of the tenants, but that they are not directly liable to the substitutes of entail. Apologizing to your Lordships for going so largely through the case, which I have done purely for the purpose of pointing out the differences there are between the two cases, I will close with stating, that when I put the question for reversing these judgments, it is impossible that I can agree to reverse further than is necessary to make a change in the language of some of the interlocutors, with reference to the particular circumstances which I have adverted to. If any other noble Lord, who has considered the subject, is disposed to state his sentiments, I am sure your Lordships will have great pleasure in hearing him.

March 10. 1824. LORD REDESDALE.

My Lords,—I will simply say, that all which has fallen from the noble and learned Lord completely meets with my concurrence, as far as I have formed a judgment upon the subject.

My Lords,—It must strike every person as a very extraordinary thing, that the late Duke of Buccleuch, having litigated these leases for nearly ten years, happening to die before the final judgment was pronounced avoiding the leases, should obtain nothing by the suit which he instituted, and which is the result of the determinations which have been made; but, my Lords, they appear to me to be determinations perfectly conformable to that which has been considered as the established law of Scotland, and founded upon the civil law; for I do not conceive, as far as I have any judgment upon the subject, that it is true that in Scotland the Scotch Judges have gone beyond the rule of the civil law upon the subject. It appears to me that, generally speaking, they have conformed to the rule of the civil law upon the subject; for I apprehend that, according to the civil law, as it is laid down in the different writers upon the subject, unless it clearly appears in the course of the litigation that the right is with the person who demands the property, the bona fides still continues until judgment.

That this is the rule which in a certain degree prevailed in this country, till it was altered centuries ago by the Legislature, is perfectly true also, and the reason why it was altered by the Legislature of this country was this, that it was an encouragement to litigation; and surely this case shews that the rule is an encouragement to litigation. It induces every person who has a doubtful right which is demanded against him, if he has the least probable cause of contesting the claim, to contest it to the utmost; for what is the result here?—that the contest which has taken place upon this subject has enabled the persons who held by wrongful title to receive sums of money, perhaps a hundred times the amount of the costs of the litigation: that has been the result of the establishment of this rule in Scotland, which has been put an end to by Act of Parliament in England.

Another reason which was given for altering the law in England upon that subject was, that it was a rule which encouraged the purchase of doubtful titles, and the law of England has been particularly anxious to prevent the purchase of doubtful titles. Your Lordships will see that this rule tends extremely to induce the purchase of doubtful titles; for if a man can, after a doubtful title is questioned, hold the possessor of the property in protracted litigation ten or twelve years, giving always for a doubtful title considerably less than the actual value if the title was clearly good, the result is, that though the title may be finally avoided, he may put into his pocket the whole sum he has originally paid, and perhaps more, taking himself the chance also of having a profit from retaining the possession, or the chance of making his doubtful title available. My Lords, I therefore take it to

be a rule contrary to the policy which has been adopted in this country, but a policy which has been adopted by positive law. I therefore, my Lords, do not feel upon this subject any doubt that the Courts in Scotland have been right in these particular cases with respect to the tenants. March 10. 1824.

My Lords,—If I could have formed a doubt upon the subject, it would have been from a case which has been since, and very lately, argued at your Lordships' Bar, when the noble and learned Lord now upon the Woolsack was not present, and in which it seems to me that the Court in Scotland has been a little forgetful of this principle. My Lords, when that case comes to be decided, I shall take the liberty of stating my reasons for dissenting from what the Court has done there; for they have given back-rents in fact,—for that is the mode in which they have done it, in the shape, and in the name of damages,—they have in fact given back-rents, not only from the institution of the suit, but before the institution of the suit, and from the moment that those rents could possibly be demanded. When that case comes to be discussed, I shall take the liberty of saying what I think upon the decision of that case, and how far it interferes with the case which is now before your Lordships.

My Lords,—I would observe, too, upon the peculiarity with regard to the Neidpath case, because the question was first debated in the March and Neidpath case in the lifetime of the Duke of Queensberry, and then the demand against the Duke of Queensberry was a demand for damages. Your Lordships will observe, that the mode in which this question has been treated, has been to consider the demand made against the tenants as a demand for what are called violent profits, and the application of the term violent profits seems to me to shew what was the original idea upon the subject of those who framed the civil law, upon which these cases are in a great degree decided,—they considered a person who was possessed of a property of this description to be in the nature of a robber, and that therefore he was to be proceeded against, if the decision was against him, as a person that was to be treated with the utmost severity and hardship that could possibly be applied to this case; and they said, that no person could be considered as an absolute robber if he is free from what they call the *dolus* in those cases. In truth, my Lords, that seems to have been the original idea in the civil law, but it has been refined upon, as many law questions have frequently been refined upon, until it is extremely difficult to see what was the original principle upon which they have proceeded.

My Lords,—However, the claim of the family of Buccleuch against what is called the Queensberry property is a demand of a different description; it is a demand of nothing more than the just rent as it is described, which might be made of the land. Perhaps the demand that is made in respect of what is called the Neidpath estate, commencing in the lifetime of the late Duke of Queensberry, being a demand

March 10. 1824. for damages, cannot be considered precisely as of the same description at the time that suit was instituted by the Earl of Wemyss; unless he insisted, which he did not, upon the forfeiture of the property on account of the violation of the entail, the demand could only be for damages, because he had no title for rents during the lifetime of the late Duke of Queensberry;—the same idea with respect to damages which has been followed up in the proceeding in the case to which I have alluded which has been before the House, (not that now under its consideration), and that perhaps has occasioned the difference in the decision which has taken place in the Court below in that case from the decision which has taken place in this case. It strikes me, however, that the decisions which have been made in the Court below, in limiting the demand for the real rents until the time of the judgment, is in conformity to what has been the established law of Scotland, taken from the civil law, as far as I can judge upon the subject, and that the Courts in Scotland have not gone, as has been suggested, beyond the rule which was adopted in the civil law.

My Lords,—I cannot agree in one of the principles upon which that rule is founded, for they say that one reason for this rule is non debet possessor temere in defensum.

Now I do not think that the law requires any encouragement upon that subject; but I do hope that those who are interested in the law of that country will consider whether this is not a subject which, for the purpose of avoiding litigation and preventing litigation, does require the interposition of the Legislature. I am sure there can be no rule which tends more to protract litigation than that which this establishes, because the consequence would be, and it has been in the case of the late Duke of Buccleuch, that though the late Duke of Buccleuch was entitled for ten years to avoid these leases and have the possession of the estate, yet his representatives can derive no benefit whatsoever from the right, merely because the litigation upon the subject has been so long protracted. My Lords, having said thus much, I will only add, that I perfectly concur in every respect in what has fallen from the noble and learned Lord who addressed your Lordships.

J. CHALMER—J. RICHARDSON,—Solicitors.

DAVID MATHIE, Appellant.—*Abercromby*.

No. 13.

ROBERT MUIR, Respondent.—*Shadwell*.

*Title to Pursue—Guarantee—Fraud.*—An indorsee of a bill having, in consideration of a premium, obtained a guarantee of it from A, to whom he delivered, but did not indorse it; and the bill having been dishonoured, and the drawers of it having granted to a trustee for A two promissory-notes in place of it; and B having bound himself by a letter to see them paid;—Held, 1. (affirming the judgment of the Court of Session), That the trustee for A was entitled to pursue B for payment of the promissory-notes; and, 2. That it was not relevant for B to allege that the original indorsee was a party to a general agreement, under which B had been induced, by the misrepresentation of the drawers, to guarantee to their other creditors the payment of a part of their debts.

JAMES and David M'Gown, manufacturers in Glasgow, purchased goods from William Ewing, merchant there, acting for Messrs Orr and Company of Paisley, and in payment indorsed to him a bill drawn by them on Lamont and Company of Glasgow, for L.420. 15s. dated 19th August 1815, and payable at seven months. Thereafter, on the 2d of December 1815, Leckie and Alexander, manufacturers in Glasgow, guaranteed to Ewing the payment of this bill to the extent of L.300, by a letter in these terms:—‘ We have this day received from you L.7. 10s. ‘ as guarantee and commission on L.300 on a bill by J. and ‘ D. M'Gown on Alexander Lamont and Company, at seven ‘ months from 19th August 1815, for L.420. 15s., only L.300 of ‘ which we guarantee the payment of to you or your constituents.’ The bill was thereupon delivered by Ewing to Leckie and Alexander, but was not indorsed to them.

The acceptors, Lamont and Company, became insolvent, and the affairs of the M'Gowns having got embarrassed, they called, in the month of March 1816, a meeting of their creditors, before whom they laid a state of their affairs, shewing (as they alleged) that they were solvent, and would have a reversion of about L.4000. At this meeting the creditors came to an agreement, expressed in these terms:—‘ We, subscribers, creditors, or ‘ agents for creditors, of Messrs James and David M'Gown, ‘ having considered their request to be indulged in the manner ‘ after-mentioned, as also the depressed state of the trade, and ‘ the representations as to the state of their affairs indorsed here- ‘ on, do agree to take their bills at six, twelve, and fifteen months, ‘ from the 15th day of March instant, for the debts owing us or

March 12. 1824.

1st DIVISION.  
Lord Alloway.

March 12. 1824. ‘our constituents, including interest; we receiving a guarantee for the regular payment of the third instalment.’

Annexed to this agreement was the following note, alluded to in it:—‘We have granted the Messrs M’Gowns the indulgence before-mentioned, and recommend to the other creditors to do so, from the circumstance that the state of their affairs, exhibited to us, shews that they will enjoy a reversion of between three and four thousand pounds.

‘Glasgow, March 5. 1816.

‘JOHN FREELAND and Co. for Culcreuch Cotton Company.

‘WILLIAM DONALDSON, WILLIAM DUNN, FULTON M’KERREL.’

In consequence of this arrangement, and, as the appellant alleged, on the faith of the state which had been exhibited by the M’Gowns, he granted the following obligation for payment of the third instalment:—‘In the event of Messrs J. and D. M’Gown obtaining the assent of their creditors to the agreement as to the payment of their debts, agreed to by you this morning, I hereby promise and engage to guarantee to you and these creditors the regular payment of the third instalment. I am, &c.

‘Glasgow, March 5. 1816.

‘To Messrs John Freeland and Company, for themselves, and the other creditors of Messrs J. and D. M’Gowns, manufacturers in Glasgow.’

To this arrangement he alleged that Ewing, and Orr and Company, agreed to accede, but there was no written evidence of that allegation.

When the bill for L. 420. 15s. became due, it was dishonoured; and Leckie and Alexander thereupon indorsed it to the respondent, Muir, one of their clerks, with a view to recover the amount. Muir then raised diligence upon it, and, with the approbation of Ewing, and of Leckie and Alexander,—(the former of whom had an interest in the bill to the extent of L. 120, being the difference between the sum guaranteed by Leckie and Alexander, and its amount),—entered into an arrangement, by which, in lieu of that bill, he agreed to take two promissory-notes by the M’Gowns, the one for L. 190. 7d. and the other for L. 192. 7s. 3d., and both to be guaranteed by the appellant. Accordingly, two promissory-notes, dated 22d March 1816, were granted by M’Gowns, and at the same time the appellant delivered this obligation:—‘I hereby agree to guarantee to you the regular payment of Messrs J. and D. M’Gown’s promissory-

‘notes to you at six and nine months from this date, the first March 12. 1824:  
 ‘for L.190. 7d: and the second for L.192. 7s. 3d., the same as  
 ‘if these had been indorsed by me.’

Muir then indorsed these bills to Leckie and Alexander, who, together with Ewing, granted to him an obligation ‘to free and  
 ‘relieve you from all recourse from said indorsation, as these two  
 ‘bills are solely on our account, and at our risk.’

In the month of August thereafter, the M‘Gowns were rendered bankrupt, and a sequestration was awarded of their estates. The promissory-notes were dishonoured, and having been reconveyed by Leckie and Alexander to Muir, he raised an action for payment of them before the Magistrates of Glasgow against the appellant, founding on his letter of guarantee; and at the same time he obtained an obligation of relief from Ewing, and from Leckie and Alexander, of any expenses which he might incur.

In defence, the appellant maintained, that as the bill of L.420. 15s. had never been indorsed to Leckie and Alexander, the right to it, and the consequent *jus exigendi*, remained vested in Ewing, or in Orr and Company; and that, as the promissory-notes were mere substitutes for it, Muir, as representing Leckie and Alexander, had no title to pursue: that as the guarantee of the promissory-notes formed an accessory to the guarantee relative to the general arrangement, to which both Ewing, and Orr and Company, had acceded; and as the general guarantee had been obtained by a fraudulent misrepresentation of the state of the funds of the M‘Gowns, the appellant was not bound by it, and consequently the present one was also ineffectual. The Magistrates pronounced this judgment:—‘Find the verity and validity  
 ‘of the obligation of guarantee libelled on, not disputed; repel  
 ‘the defence founded on the alleged erroneous and fallacious statement of the affairs of J. and D. M‘Gown, by which the defender  
 ‘may have been induced to grant the said obligation of guarantee,  
 ‘in respect it was the legal duty of the defender to have ascertained the accuracy of the said statement before he granted any  
 ‘such obligation, and in respect it is not averred or offered to be  
 ‘proved that the pursuer was in any way accessory to the preparation of the said fallacious statement, or was even in the  
 ‘knowledge of the statement being erroneous: Find, That in  
 ‘granting the said obligation of guarantee, the defender appears  
 ‘to have relied on the statement of J. and D. M‘Gown, for whom  
 ‘he became cautioner, and is liable for the consequences of his  
 ‘having done so: But, before farther judgment, allow the defender a proof by writ or oath, that the pursuer was not a bona



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‘ fide onerous holder of the bill for which the promissory-notes  
 ‘ guaranteed by the defender were granted, but held the said  
 ‘ bill in trust for William Ewing, and that the said William  
 ‘ Ewing had, before delivering the said bill to the pursuer, ac-  
 ‘ ceded to the composition agreement between J. and D. M’Gown  
 ‘ and their creditors; and allow the pursuer a conjunct proof.’  
 The appellant having reclaimed, the Magistrates found, ‘ in  
 ‘ the first place, with regard to the character in which, and the  
 ‘ title upon which, the pursuer insists in the present action, That  
 ‘ the delivery of the bill for L.420. 15s. (for which the promis-  
 ‘ sory-notes guaranteed by the defender were granted) by Mr  
 ‘ Ewing, the confessedly onerous indorsee, for the behoof of his  
 ‘ constituents, John Orr, junior, and Company, of the said bill  
 ‘ of Leckie and Alexander, in security of their guarantee of the  
 ‘ said bill to the extent of L.300, was sufficient to vest in Leckie  
 ‘ and Alexander, for whom the pursuer is confessedly merely a  
 ‘ trustee, the jus exigendi of the said bill to the said extent,  
 ‘ onerous, and not defeasible by the act of the said indorsee, or  
 ‘ his said constituents, subsequent to the date of delivery of the  
 ‘ bill to Leckie and Alexander: That it is not competent for the  
 ‘ defender to prove by the judicial examination, except upon oath  
 ‘ of the pursuer or his said constituents, any more than by parole  
 ‘ evidence, that they were not onerous holders to the said extent  
 ‘ of the said bill; but allow the defender a proof, by writ or oath  
 ‘ of the pursuer and his said constituents, that they were not  
 ‘ onerous holders of the said bill, in the manner and to the ex-  
 ‘ tent averred by them, as also of the date at which the said bill  
 ‘ was delivered to them for the onerous consideration which may  
 ‘ have been given for it; and grant diligence against havers  
 ‘ at the defender’s instance. In the second place, with regard  
 ‘ to the validity of the defender’s letter of guarantee, and the  
 ‘ relevancy of the averments in his condescendence, to relieve  
 ‘ him from his said obligation, find, That although several of  
 ‘ the said articles do not appear to be directly relevant, and others  
 ‘ only hypothetically relevant, a special judgment as to the rele-  
 ‘ vancy, containing only a partial or restricted admission of the  
 ‘ said articles to proof, cannot well be pronounced beforehand,  
 ‘ without incurring the risk of excluding relevant evidence, or  
 ‘ injuring the effect of the whole proof; but find, That to entitle  
 ‘ the defender to adduce parole evidence for the purpose of  
 ‘ obtaining relief from his letter of guarantee, it is necessary that  
 ‘ the defender aver not merely error, arising so far from his  
 ‘ own negligence, but actual fraud and deception on the part of



‘ the pursuer, or of those in the right of the said bill, either as principals or directly as accessories ;—see *Moses against Craig*, 4th February 1773 ; *Donaldson against Morrison*, 1787 ; and with this explanation, and before judgment as to the relevancy thereof, allow the defender a proof prout de jure of the matters set forth in the condescendence, so far as not admitted or established by the documents produced.’

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A proof having been then taken, the Magistrates, on advising it, issued this interlocutor :—‘ Before pronouncing judgment on the merits, appoint the defender to state shortly, and without argument, in a note annexed to his information, whether he has any further proof to adduce, for the purpose of establishing that the pursuer, or his constituents, *Leckie and Alexander*, as onerous holders of the bill in question to a certain extent, or *Mr Ewing*, as onerous indorsee for the behoof of his constituents, *John Orr, junior, and Company*, were parties, or accessory to the agreement between *J. and D. M’Gown* and the defender, on the one hand, and certain of their creditors on the other hand, which proceeded on a statement of the affairs of *J. and D. M’Gown*, therein referred to, and by which the defender engaged to guarantee the debts of the said *J. and D. M’Gown* to a certain extent, in the event of their obtaining the consent of their other creditors, so as to shew that the special agreement made by the pursuer, or his constituents, which was subsequent to, and different from the said general agreement, both in the time of payment and in the amount of guarantee, formed a part of, or fell under the general agreement, to the effect of entitling the defender to found, as in a question with the pursuer or his constituents, upon the erroneous or fraudulent nature of the representation on which the general agreement proceeded, or on the non-implement of the condition upon which the defender agreed to become guarantee ; viz. the accession of the whole creditors ; or, upon the breach of the said agreement, by the acceding creditors adopting separate measures, and obtaining payment before the instalments agreed upon became due, and thereby forcing on a sequestration.’

No further proof having been offered, the Magistrates found the allegation not established ; and therefore, and upon the other grounds noticed in their interlocutors, decerned in terms of the libel. The appellant then brought an advocacy, in which the Lord Ordinary repelled the reasons, and remitted simpliciter. And on advising a representation he adhered, ‘ for the reasons stated in the judgments in the Inferior Court.’ The appellant

March 12. 1824. reclaimed to the Inner-House; but their Lordships, on the 7th of December 1820, and 17th of January 1821,\* refused two petitions without answers.

Against these judgments the appellant entered an appeal to the House of Lords, and in support of it maintained,—

1. That as the original bill was merely deposited with Leckie and Alexander, and as they did not pay value for it, and as the promissory-notes were granted in place of it, the *jus exigendi* did not vest in them, but remained in Ewing, or Orr and Company, who confessedly had an interest to the extent of L. 120; that accordingly Leckie and Alexander could not have protested the original bill, nor done diligence upon it; and therefore the respondent had no title to pursue, and at all events was liable to all the defences pleadable against Ewing, or Orr and Company.

2. That it was established by the written and parole evidence, that Ewing, and Orr and Company, had acceded to the general arrangement; and as the guarantee relative to that arrangement had been obtained by fraud, and as it was with the view of carrying it into effect, and as subsidiary and accessory to it that the present obligation had been granted, it was neither consistent with justice nor equity that the appellant should be compelled to implement that obligation.

3. That in obtaining the obligation in question a deception had been practised on the appellant, because it was held forth that the respondent was the true creditor in the bill, whereas he was trustee for creditors who had acceded to the general arrangement; and if the appellant had been aware of this fact, he would never have granted the obligation in question, seeing that the hands of these creditors were already tied up by the general arrangement. And,

4. That, subsequent to the institution of the action, the appellant had acquired right to a bill on which Ewing was an obligant, and he was therefore entitled to plead compensation against him.

To this it was answered,—

1. That as Leckie and Alexander had become bound for payment of the original bill to the extent of L. 300, and received delivery of it in the month of December 1815, the *jus exigendi* was thenceforth vested in them, at least to that extent, and their right could not be affected by any accession made by Orr and Company, or Ewing, to an arrangement with the M'Gowns in

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\* Not reported.

the month of March thereafter: that, besides, the promissory-notes were payable to Leckie and Alexander, and the appellant had bound himself to pay to the respondent for their behoof; so that he could not object that the *jus exigendi* quoad these notes was not vested in them, or plead defences competent only against Ewing, and Orr and Company. March 12. 1824.

2. That it was not true that there had been any accession; and although it might be competent to prove, by parole testimony, facts and circumstances from which an accession might be inferred, yet it was not competent to establish in that way an actual agreement to accede: that neither was it true that the letter of guarantee in question formed a part of the previous general arrangement; that they were entirely different in every particular; that, even if they were identified, still there was no evidence shewing that the general arrangement had been accomplished by fraud; and the allegation, that the M'Gowns had misrepresented the state of the funds to the appellant, could not affect the creditors.

3. That it was not true that any deception had been practised on the appellant in obtaining from him the letter of guarantee, nor was there any evidence of that allegation; but, on the contrary, it was, together with the promissory-notes, voluntarily tendered by him and the M'Gowns. And,

4. That as the respondent, on behalf of Leckie and Alexander, was an onerous holder, and Ewing had no interest in the promissory-notes, being (as alleged by the appellant himself) a mere trustee for Orr and Company, and as he had become bankrupt, and the appellant had subsequently purchased up the bill at a small rate, with a view to found compensation, that plea could not competently be entertained.

Lord Gifford moved, and the House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed, with L. 100 costs.'

*Appellant's Authorities.*—Campbell, July 5. 1791, (11,683.); Wilson, Feb. 18. 1762, (1214.); Croll's Trustees, May 7. 1791, (12,404.); 4. Ersk. 2. 20.; M'Ilhose, Feb. 28. 1744, (12,389.); 2. Bell, 443.; Watson and Company v. Auchencloss, Feb. 12. 1818, (not rep.); Mack, Nov. 25. 1814, (F. C.)

C. BERRY—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No. 17.*)

No. 14.

Earl of MANSFIELD, Appellant.—*Shadwell—Murray.*JAMES WRIGHT, Esq. Respondent.—*Warren—Abercromby.*

*Churchyard—Sepulchre.*—A clergyman and one of his sons having been buried in a spot adjacent to, and in front of, the parish church, where the minister had his burial-place; and the church having been transported to another part of the parish; and the area, with the burial-place, having been excambied and conveyed to one of the heritors, who included them in his pleasure-grounds;—Held, (affirming the judgment of the Court of Session), That a son of the clergyman was entitled to insist on having the graves protected by a fence; and that he and the other near relations were entitled to visit the graves at all proper times.

March 17. 1824.

2d DIVISION,  
Lord Pitmilley.

PRIOR to 1784 the parish-church of Scone stood on the Moot-Hill, near the old palace or abbey of Scone. The churchyard was placed at the distance of 200 or 300 yards from it; but the minister of the parish had his burial-ground close by the church itself. In the above year the appellant's predecessor, David Viscount of Stormont, being desirous to extend his pleasure-grounds, and include within them the Moot-Hill, and to remove the church and churchyard, applied to the Presbytery of Perth for authority to do so, and to rebuild a new church in a more convenient situation. This was agreed to by the Presbytery; and an excambion was executed, whereby the area on which the church stood was exchanged for a piece of ground belonging to Lord Stormont, on which the new church was to be built; but it did not appear that any excambion was made in regard to the churchyard, which accordingly remained as formerly. In consequence of this arrangement a new church was built, and around it there was a piece of ground enclosed by a wall, which, it was alleged by the appellant, was the property of Lord Stormont. In 1793 the Rev. Mr Hunter, the then clergyman of the parish, died, and was buried in this piece of ground, and in front of the new church. He was succeeded by the Rev. John Wright, whose son Charles having died in 1794, was buried, as a member of the clergyman's family, in the same piece of ground; and Mr Wright himself having also died about the end of the same year, was buried close by his son.

In 1804 the appellant, who had succeeded Lord Stormont, applied to the Presbytery for authority to remove the new church to another part of the parish, which was granted, and confirmed by a decree of the Court of Teinds. This decree, however, gave no authority to interfere with the churchyard, or any burial-place.

In virtue of it, the church, and the wall of the surrounding ground, was taken down, and a new church built in a different part of the parish. The area on which the church had been built, together with the surrounding ground, in which Mr Hunter, and the Rev. Mr Wright and his son, had been buried, were then enclosed as part of the appellant's pleasure-grounds, which he planted with trees and shrubbery.

In the meanwhile, the family of Mr Wright had removed to Edinburgh; but the respondent, his son, having visited Scone in 1817, and finding the graves of his father and brother unprotected, requested to be allowed to erect a fence around them, so as to prevent them from being intruded upon, and stated, that he conceived that he had a right to visit these graves at any time he thought fit. The appellant declined to allow the graves to be fenced round, but offered to place grave-stones or slabs upon them, and to grant permission to the respondent, or any of the family, to visit them, on leave being first asked. This, however, not being satisfactory to the respondent, he presented a petition to the Sheriff of Perthshire, in which he prayed him 'to ordain his Lordship to rebuild the walls of the churchyard of Scone, in which the petitioner's father and brother were buried, and to restore the churchyard, with the gate and necessary access, in all respects, to the state and situation in which they were in the year 1794; or otherwise to grant warrant to; and authorize the petitioner, at his own expense, to erect and build an enclosure, with a gate in it, around the two graves of his late father and brother; and to ordain Lord Mansfield to give at all times free and open access thereto.' Answers having been lodged, the sheriff-depute pronounced this interlocutor:— 'Finds, that in the year 1794, when the church was removed from its then site, an excambion took place under the sanction of the Presbytery, by which a portion of the grass glebe belonging to the minister was conveyed to the Earl's father, the Viscount of Stormont, for the purpose of erecting a new church, and making a new churchyard, fit to accommodate the parish: Finds it admitted by the Earl, that though the old churchyard remains as the burying-ground for the parish, that in the ground surrounding the new church some persons were interred, and, amongst others, that the Rev. Mr Wright and his son were interred in that ground in the year 1795; but finds it not alleged that a purchase was made from the heritors of any part of this ground as the burying-ground; or that it was enclosed with a wall or rail, or in any way

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‘separate from the rest of the burying-ground: Finds, that although every person dying within any parish is entitled to be buried within the churchyard belonging to the parish, yet this confers no right on the relations of the deceased to enclose the ground, or appropriate it exclusively to the use of the body so interred; but the interest of relations in that case extends no further than to see that the churchyard shall not be applied to any ordinary use: Finds, that the petitioner, as not being resident within the parish, neither claims, nor has a title to claim, any right to bury in the said burying-ground: Finds, in the year 1804 the church of Scone was again, by a decree of the Commissioners of Teinds, removed to its present situation; and that the ground around the former church, used as a burying-ground, occupied by the bodies of the Rev. Mr Wright and his son, and included in the respondent’s policy, was protected from cattle, and never appropriated to tillage: Finds it averred by the Earl, and not denied by the petitioner, that the former offered to the petitioner to allow him, even at this distance of time, to cover the graves of his father and brother with slab-stones: Finds, under these circumstances, the application was unnecessary; therefore dismisses the petition, assoilzies the defender, and decerns.’ The respondent having then brought an advocacy, the Lord Ordinary remitted ‘to the sheriff, with this instruction, that he ordain the Earl of Mansfield, at sight of the sheriff, to enclose with a stone fence or railing, as may be agreed upon, the ground in which the remains of the late Mr Wright and his son are deposited, and to allow the relations of the deceased access to such enclosure.’ The appellant having represented, his Lordship adhered, ‘with this explanation, that access is to be allowed to the enclosed spot at all reasonable times, and on notice, if required, being given to the servants of the Earl, or others to whom the charge of the pleasure-ground may be intrusted by him. Against these judgments the appellant reclaimed to the Inner-House; and when the case came to be advised, there was a difference in the statements at the Bar as to the number of persons who had been interred in the churchyard erected in 1784. But

*The Lord Justice-Clerk*, on consulting with the other Judges, stated, that it was sufficient for the Court, without inquiring more minutely into the fact, to know, that the Rev. Mr Hunter, and the Rev. Mr Wright and his son, were interred in that churchyard.

*Lord Craigie* said, That as this was a case of a novel and inter-

resting nature, he had paid more than ordinary attention to it. March 17. 1824.  
 It appeared that the ground upon which the churchyard was erected in 1784, had previously been the property of the Earl of Mansfield. From 1784 to 1804 every person dying in the parish had a right to be buried there; but in that year a new churchyard was furnished, and the ground of the former one being no longer occupied, returned to the Earl free and unburdened, excepting that it should not be disturbed till the remains of the bodies there interred should have returned to their original dust. There is no one requiring the walls of that churchyard to be rebuilt excepting the respondent. His Lordship thought that Mr. Erskine's opinion was well founded, and that it applied to the present case. The Lord Ordinary had done more than the party required. The interlocutor had gone *ultra petita*. It had ordained the Earl to build a stone fence or railing, when the petition to the sheriff merely required permission to do so. He thought that Lord Mansfield had made a fair and liberal offer when he permitted the respondent to lay flag-stones upon the graves. If the walls had remained, and the churchyard continued, the family of a clergyman would not be allowed to lay flag-stones upon his grave.

*Lord Bannatyne* said, That no doubt the ground that had been erected into a churchyard in 1784 ceased to be a churchyard in 1804, and returned to the Earl; but it returned under the express reservation that all the bodies that had been interred there were to be protected. It would do no harm, to prevent abuse, that the right of access should be limited to the immediate members of the family; but, on the whole, he thought the judgment of the Lord Ordinary well founded.

*Lord Glenlee* said, That the Earl's right to the ground of this churchyard was a right of a peculiar kind; it was neither a right of property nor a right of servitude. Lord Stormont got the ground (which formerly belonged to the minister) for a special purpose, and if the parishioners had opposed him in taking down the walls, when the church was removed in 1804, they would have been entitled to do so. There was some doubt whether the expense of enclosing these two graves should not be borne by the Earl; but that is of no great consequence, and, in the main, the interlocutor is right.

*The Lord Justice-Clerk* stated, That when the petition was moved in May 1819, he gave his reasons for refusing it without an answer; but some of their Lordships then thought, that as it was a new and interesting case, it should receive a more solemn con-



March 17. 1824. sideration: He had since fully reconsidered the case, and the more he considered it, the more reason he found for confirming the Lord Ordinary's judgment, even in the most favourable view for Lord Mansfield, and upon his own statements. The late Lord Mansfield, no doubt, acquired right to the ground in 1784, but it was subject to the servitude or burden of that ground being formed into a churchyard. Since 1804 no person had a right to bury their dead there; and the respondent was not claiming any such right. There was no doubt that Mr Wright and his son were lawfully interred in the ground set apart for that purpose. They were interred near the grave of the previous minister of the parish, and without objection on the part of Lord Mansfield, or of any other person. Leave to bury their bodies there, indeed, could not have been refused. It is clear as the sun at noon-day, that by the common law no person can interfere with these graves, or do any thing affecting the ground, that can tend in any way to injure the feelings of the connexions of those who are there interred. No one has a right to break up the ground of interment to the remotest periods of time. There the dust must for ever remain. Lord Mansfield, notwithstanding, did take down the walls of the churchyard, and the son of a clergyman there interred comes forward and asks, that Lord Mansfield shall either restore the walls of the churchyard to the state in which they were before, or allow him, at his own expense, to make an enclosure of the immediate graves of his father and of his brother. He is well-founded in this demand. The finding of the Lord Ordinary, that the Earl shall form an enclosure, by erecting a wall or railing, was in fact accommodating the noble Earl. He was bound not to have interfered with any of the walls, and had he let them alone, the present application would not have been made necessary. There must be a fence around this sacred spot. He did not mean sacred in any other sense than as sacred to the feelings of those concerned. The expense of building this fence had been properly laid on Lord Mansfield, because he had taken down the former protecting fence, and rendered another necessary. The interlocutor of the Lord Ordinary could only refer to immediate descendants. If the whole inhabitants of Perth, under pretence of being relations, were to interfere with the Earl's grounds, the Judge Ordinary would prevent them. The Lord Ordinary had judiciously provided for any such risk, by limiting access to seasonable times, and by requiring reasonable notice.

Their Lordships, therefore, on the 8th of June 1820, adhered, March 17. 1824.  
and found the appellant liable in expenses.\*

The appellant then entered an appeal to the House of Lords, and maintained,—

1. That as the ground in which the graves were situated belonged in property to him, and as they were situated in a place where they were as little liable to be intruded upon as in any churchyard, and as he had offered to cover them with grave-stones or slabs, the respondent was not entitled to insist on having them enclosed and fenced round. And,

2. That if the ground was to be regarded as a burial-place or churchyard, then it was incumbent, not upon the appellant, but upon the whole heritors of the parish, to erect that enclosure; and that, in the prayer of the respondent's own petition, he had offered to make it, whereas the appellant had been ordained to do so by the judgments of the Court of Session.

On the other hand, it was pleaded by the respondent,—

That from time immemorial the clergymen of the parish, and their families, had been buried close to the church, and not in the ordinary churchyard, which was at a distance from the church;—that accordingly Mr Hunter, and the respondent's father and brother, were so buried, and therefore the ground was to be regarded as a proper burial-place, and as such it had been enclosed, but the wall had been taken down by the appellant;—that such being the case, the respondent had a right to see the ground protected in the same manner as any other churchyard, so that the remains of his relations might not be disturbed, which would not be accomplished by covering the graves with slab-stones; and that he ought not to be impeded in having access to the graves.

The House of Lords 'ordered and adjudged that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

The LORD CHANCELLOR said,—That he felt great satisfaction in not being obliged, in moving for judgment in this case, to propose any thing which might ultimately foreclose the rights of either party, because the interlocutors of the Court of Session still leave to the parties an opportunity to settle the dispute. How that Court came to annex so many conditions to their interlocutors (a practice totally unheard-of in England) his Lordship confessed he did not understand. But in moving for an affirmance of the judgment, he trusted there was still some hope of an arrangement between parties so respectable; and unless they came to some understanding, he did not see how these interlocutors could be carried into execution.

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\* Not reported.

March 17. 1824. *Appellant's Authorities*.—1597, ch. 232; Heinecc. Instit. l. 2. c. 1. § 323; 1. Craig, 15. 11.; Lithgow, Jan. 15. 1697, (9637.); 2. Ersk. 1. 8.; Spence, Dec. 1. 1808, (F. C.); Connel on Parishes, 167. 179.

*Respondent's Authorities*.—1. Craig, 15. 2.; 2. Bank. 8. 184.; 1. Bank. 3. 12.; 2. Ersk. 1. 8.

SPOTTISWOODE and ROBERTSON—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No. 19.*)

No. 15. PETER and JOHN HUTTON, Appellants.—*Sol.-Gen. Wetherell—Walker.*

DAVID GIBSON, Respondent.—*Murray.*

*Process—Amendment of Libel*.—Held, (affirming the judgment of the Court of Session), That it is competent, before great avizandum is made with an action of reduction on the head of forgery, to amend the libel, by adding deathbed as an additional reason.

March 23. 1824.

2D DIVISION.  
Lord Cringletie.

DAVID GIBSON, the heir of conquest of the late Peter Gibson, merchant in Edinburgh, who died on the 3d of September 1803, leaving, as was alleged, two deeds of settlement,—the one dated on the 2d of September, being the day preceding his death, and the other on the 3d of June 1802,—brought an action of reduction improbation of them, on the ground that they were false and forged. To that action he called the appellants, Peter and John Hutton, as defenders, who had the chief interest under the deeds, and by whom he alleged the forgery had been committed. The action having come before Lord Reston, a warrant was granted for transmitting the principal deeds from the record, which was accordingly done without objection. Immediately thereafter Gibson proposed to make an amendment of the libel, by adding the following reason of reduction:—  
‘The said pretended deed of settlement, dated the 2d day of September 1803, and recorded in the books of Council and Session the 7th day of the said month and year, even if it were a genuine deed, truly signed, and regularly executed by the said Peter Gibson, is liable to the objection of deathbed, as it is said to bear date the day before the said Peter Gibson’s death, or on one or other of the days of the said month of September and year foresaid in which he died, or of the month preceding, or at any rate within sixty days of his death, while

‘he was labouring under the disease of which he died, and therefore is reducible ex capite lecti.’ March 23. 1824.

On the death of Lord Reston, the case was remitted to Lord Cringletie, and the appellants then objected to the amendment being received, on the ground,—

1. That the amendment was inconsistent with the other reasons, seeing that it assumed that the deed of 2d September was genuine, and was subscribed by the granter; whereas the reason on which the action had been originally brought, was a denial of its having been subscribed by him, and an averment that it was forged; and it was therefore incompetent to admit such an amendment.

2. That as *exceptio falsi est omnium ultima*, no other plea could, after falsehood, be insisted in, which had the effect to set aside the writing founded on.

3. That prior to the institution of this action, Gibson had raised another, concluding for reduction of the deed also on deathbed, and which was still in dependence; so that the proposed amendment was just an indirect attempt to raise a second action of precisely the same nature. And,

4. That Gibson had homologated the deeds brought under challenge.

To these pleas it was answered by Gibson,—That as it was undoubted that he could have brought an action libelling alternatively on forgery or deathbed, there was nothing incompetent in amending the libel to that effect; and that the plea of homologation was too late, and ought to have been stated before the deeds were produced.

The Lord Ordinary admitted the amendment, and made great *avizandum* with the reasons of reduction as amended; and thereafter refused a representation by the Huttons, not only on its merits, but as incompetent, in respect ‘that, by having made great *avizandum* with the writings produced and reasons of reduction, he is exauctored;’ and at the same time issued this note:—‘The Lord Ordinary cannot discover any fair interest which the representer can have to the amendment of the libel; for even supposing it to be incompetent, there is nothing to prevent the pursuer from raising a separate action; and the only benefit which the representer can draw from that, is the pleasure, if it be one, of putting himself and the pursuer to additional expense.’

A second representation was refused by his Lordship, who again expressed his opinion in the following note:—‘On the

March 23. 1824. \* question of the power of admitting the amendment, the Lord Ordinary is completely satisfied that it may be and is correctly done. If the representers will look at the Act of Sederunt, 1st January 1726, they will there see, that in reductions and improbations, after great avizandum has been made, and after the cause has been remitted to an Ordinary, the pursuer has six days to put in additional reasons of reduction; and a fortiori may be produced an additional reason before the action is carried into the Court by great avizandum. With respect to the two reasons of reduction being destructive of each other, that is another question, and comprehends the inquiry, whether exceptio falsi sit omnium ultima; as to which the representers may look at 22d February 1676, the Laird of Innes v. Gordon; and 8th July 1697, Forrester v. Rowal. But at any rate, if the pursuer be bound to betake himself to the one or the other of his reasons of reduction, that is open to the representers to insist on it, when the cause shall be remitted by the Court to an Ordinary. As to the pursuer having barred his right of challenge by homologating the deed challenged, the representers ought to have pleaded that in limine before Lord Reston, when his Lordship, 15th January 1818, granted warrant to the Lord Clerk Register for producing the deeds called for, and when they were lodged in process. By the interlocutor pronounced by the Lord Ordinary making great avizandum, he considers himself exauctorated; and were he not, he certainly would not listen to the prayer of this representation, which is confined entirely to desiring the action to be dismissed, on the ground of the amendment being incompetent. He is clearly of opinion that an amendment is competent. If the Court remit the cause to the Lord Ordinary, they may probably do so under a reservation of all objections to the title of the pursuers.\*

The appellants having reclaimed, the Court, on the 17th of January 1821, adhered.\*

The appellants then entered an appeal on the same grounds which they had urged in the Court of Session, but the House of Lords ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed, with L.100 costs.\*

J. BUTT—J. RICHARDSON,—Solicitors.

(Ap. Ca. No. 20.)

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\* Not reported.

GIBSON CRAIG, Esq. Appellant.—*Clerk—Cranstoun—  
Moncreiff—Ivory.*

No. 16.

J. ROBERTSON and D. M'GREGOR, Respondents.—  
*Solicitor-General Wedderburn.*

*Public Officer—Stat. 6. Queen Anne, c. 26.—Exchequer.*—Held, (affirming the judgment of the Court of Session), That the Barons of Exchequer are entitled to appoint a messenger and porter to perform the menial services of the Court, although another party be vested with the right of heritable usher and door-keeper of the Court, and of appointing deputies; and although he offered to prove, that he and his deputies had been in the practice of performing the same services as those executed by the persons so appointed.

THE heritable office of usher and door-keeper of the Court of Exchequer in Scotland, was conferred on the family of Bellen-den, by a charter from Queen Mary, on the 31st May 1655, and continued in that family till 1802, when it was exposed to sale, and purchased by the appellant. On the 2d of June 1807 he obtained a charter under the Great Seal, on which he took in-vestment, whereby he was invested in 'totum et integrum hære-ditarium officium ostiarii et custodis januæ nostræ dictæ curiæ scaccarii, cum omnibus feodis, proficiis et casualitatibus, im-munitatibus et privilegiis ad idem pertinen. et spectan. et libero exitu et introitu ejusdem, una cum potestate deputatos consti-tuendi.'

March 26. 1824.

2D DIVISION.  
Lord Reston.

In virtue of this power, the appellant, like his authors, nomi-nated two deputies, William Veitch and William Allan, who accordingly acted as door-keepers, and drew the ordinary salary, with all the accessory emoluments.

By the 6th of Queen Anne, chap. 26. it is enacted, that the Court of Exchequer is hereby empowered, from time to time, 'to depute and appoint all such other officers, ministers, clerks, servants, and attendants, for the constituting of which there is no provision made by this Act, as shall be thought convenient for the use and service of the said Court, and for carrying on and dispatching of the business therein; subject and liable nevertheless to be suspended, punished, and removed; and to the taking of such oaths mutatis mutandis for the faithful exe-cution of their respective offices, places, and employments, as herein before is provided for any of the officers, attornies, or clerks in the said Court of Exchequer in Scotland.'

In 1810 the Barons of Exchequer issued a warrant in favour of the respondent, James Robertson, by which 'they appointed him messenger to the Court,' with a salary of L. 60 per annum;

March 26. 1824.

and at the same time they employed the other respondent, Daniel M'Gregor, to act in capacity of porter, for which he was paid wages weekly. The appellant, conceiving that this was an encroachment upon his right of appointing deputies, brought an action to have it found and declared, 'that the said James Robertson and Daniel M'Gregor, defenders, have no right to act as under door-keepers or messengers of the said Court of Exchequer;' and that they ought to be prohibited from doing so in future. In defence it was stated, that the Barons, by virtue of the above statute, had power to appoint such persons as should be necessary for the use and service of the Court; that Robertson was employed to carry letters and messages to and from the Barons, and answer bells, and that M'Gregor's duty was to carry coals and mend the fires; that these functions did not encroach on those performed by the appellant and his deputies, and that, even if they did, still, as he could not allege that there was any invasion of his pecuniary interests, he had no interest to object that he was gratuitously relieved of part of the burdens of his office.

The Lord Ordinary assolized the respondents, 'in respect that the defenders are paid by the public, and that their departments are distinct from those in the pursuer's charter; and in respect that this is an amicable suit for the purpose of ascertaining a question of right, and parties decline investigation into facts, dispenses with a representation.'

The appellant having reclaimed to the Inner-House, and averred, that the duties performed by the respondents were precisely those which fell to be discharged by him and his deputies, the Court appointed him to lodge a condescendence of his averments; and after having done so, their Lordships, on the 9th of March 1821, refused his petition, and adhered to the interlocutor complained of.\*

*The Court was of opinion, that, under the statute, the Barons were entitled to appoint persons to perform the menial duties connected with it: that the duties of the appellant, and his deputies, fell properly to be exercised within the walls of the Court, whereas those of the respondents were executed beyond them, and could not be considered as forming part of those to be performed by the appellant.*

He then entered an appeal to the House of Lords, and contended,—

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\* Not reported.

1. That as the nature of his office did not impose upon him a mere individual duty as a single servant of the Court, but created him the head of a general department, having the controul of all the subordinate officers who were necessary to perform the services of the Court, the appointment of the respondents was an encroachment upon his rights; and that the statute expressly declared, that the 'officers in that Court who have grants of their offices during life, or of inheritance, shall enjoy their offices according to the nature of their gifts.' And,

2. That he was ready to establish, that there was the most complete and perfect identity between the functions performed by the respondents, and those which he and his deputies were entitled to discharge, and had been in the practice of doing.

The House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.'

J. CAMPBELL—A. MUNDELL,—Solicitors.

(Ap. Ca. No. 21.)

GEORGE DUNLOP, Writer to the Signet, Trust-Disposnee of Dr No. 17.  
DAVID RAMSAY, Appellant.—*Fullerton—Murray.*

Admiral Sir ALEXANDER INGLIS COCHRANE, Respondent.—  
*Shadwell—Menzies.*

*Adjudication—Trust-Disposition—Title to Object.*—A party being in possession of an estate under an ex facie good title, but not infest, and another party, with a view to make up a tentative title to the estate, having executed a disposition of it in favour of his agent ex facie absolute, but qualified with a back-bond declaring that it was in trust; and the trustee having brought an adjudication of the estate, founding on the disposition;—Held, (affirming the judgment of the Court of Session), 1. That the party in possession was entitled to object to the adjudication; and, 2. That it was not competent to adjudge the estate on such a disposition.

IN 1719, Alexander Inglis executed an entail of his estate of *Murdiestoun*, in the county of Lanark, in favour of Alexander Hamilton, and a series of substitutes, who were bound to assume the name of Inglis. In virtue of this deed, Alexander Hamilton acquired right to the estate, and possessed it till 1783, when he died, and was succeeded by his younger brother, Gavin. On the death of Gavin, in 1798, he was succeeded by his youngest

March 26, 1824.

March 31, 1824.

1ST DIVISION.  
Lord Alloway.



March 31. 1824. brother, General James Inglis Hamilton, who being advised that the entail was ineffectual, executed a new deed of entail in favour of Colonel James Inglis Hamilton, and his heirs; whom failing, the respondent, Admiral Sir Alexander Cochrane. General Inglis Hamilton died in July 1803, and was succeeded, under the new entail, by Colonel James Inglis Hamilton, who fell at Waterloo in June 1815, leaving no issue. The respondent then took possession of the lands, and obtained himself served and retoured heir of tailzie and provision to Colonel James Inglis Hamilton, under the new entail. Soon thereafter, and before the respondent was infest, Dr David Ramsay, alleging that he was heir of line in general of Alexander Inglis, (who had executed the original entail), granted, on the 22d December 1818, an ex facie unqualified disposition of the estate of Murdiestoun, in favour of the appellant Mr George Dunlop, writer to the signet, his law-agent, and at the same time obtained from him a back-bond, declaring that he held the estate in trust for his behoof. Dr Ramsay then took out a brieve, and obtained himself served in the above character before the Magistrates of Culross, on the 9th January 1819. In the month of May following, Mr Dunlop, after having charged Dr Ramsay in usual form, brought an adjudication in implement of the estate, in which the Lord Ordinary decerned in absence. Appearance was then made by the respondent, who lodged a representation, in which he contended, that as he was in possession of the estate under an ex facie good title, it was not competent for Dr Ramsay to grant a disposition of it, and therefore he was entitled to resist the adjudication. On the other hand, Mr Dunlop contended, that, as the respondent had no feudal title to the estate, he had no right to appear; and that even although he had such a title, a disposition with a trust-bond was a proper form for trying the question of right to the estate, and accordingly was daily made use of for that purpose.

The Lord Ordinary, on advising the representation, with answers, appointed them to be printed, in order to be reported to the Inner-House, and at the same time issued this note:—‘The Lord Ordinary has appointed this cause to be reported, not from considering that, after the numerous decisions of this Court, the case is attended with difficulty; but because wherever there is any question with regard to a tentative or vesting title, it requires the most summary dispatch that the forms of the Court can admit of.’

The case having accordingly come before the Court, their

Lordships refused the representation, and of new decerned and adjudged in terms of the libel. The respondent having reclaimed, the Court, on the 29th of February 1820, altered and dismissed the process of adjudication; and to this interlocutor they adhered on the 12th of May 1820, by refusing a petition for the appellant, without answers.\* Thereafter, the respondent obtained a decree of reduction of the service of Dr Ramsay, and got himself infest in the estate.

March 31. 1824.

Against the above judgments of the Inner-House the appellant entered an appeal, and contended that they ought to be reversed, for these reasons:—

1. Because, as the respondent had not been infest in the estate of Murdiestoun, he had no right to appear as a party in the adjudication.

2. Because, even although he had made up a title to the estate, still he was not entitled to appear in the process, as the object of the adjudication in implement was merely to attach any right which Dr Ramsay might have to the estate, tantum et tale as it stood in his person, and was not intended to affect, nor could it injure, the right of the respondent to that estate. And,

3. Because an adjudication in implement, upon a disposition to an estate, with a trust back-bond, was a mode of making up a tentative title, laid down by institutional writers on the law of Scotland, and recognized by various decisions of the Court of Session: that if the respondent had a right to the estate, it could do him no injury, while, if the adjudication were not permitted to proceed during the life of Dr Ramsay, and if he had the best right to it, he would be deprived of the power of executing any settlement in relation to the estate.

To this it was answered,—

1. That as the respondent was in possession under an *ex facie* good title, he had a right to maintain and defend that possession, by resisting every encroachment upon it. And,

2. That an adjudication in implement of an estate not proved to belong to the disponent, but of which another party stood possessed, was contrary to the principles of law, and not sanctioned by any authority. In support of this it was maintained, that as a decree of adjudication in implement of such a disposition, im-

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\* See Fac. Coll. 4th July 1820, where it is stated, that 'a majority of the Court were of opinion, that it would be harsh to allow infestment to proceed upon this adjudication. With regard to the alleged practice, they thought that, if it existed, it was improper, and the sooner it were checked the better.'

March 31. 1894. plied that the lands belonged to the disponent, and that they had been conveyed by him to the pursuer of the adjudication; and as the decrees formed the warrant on which a charter and sasine from the superior might be obtained, the adjudger might thereby be enabled to make up an *ex facie* valid and effectual title to the property, and put it upon record; so that the party in possession of the estate would appear to be entirely divested, and on his death it would be impossible for his heir to serve to him as *ultimo vestitus et sasitus ut de feodo*. That it was true that, by the practice and law of Scotland, adjudications were allowed upon trust-bonds for sums of money, but such a proceeding was entirely different from that of an absolute conveyance of the property, seeing that it merely created a burden on the estate, and did not divest the person in possession of the fee; and although it was also true, that in some instances titles had been made up on adjudications proceeding on dispositions qualified with a back-bond, yet this had always taken place where the disponent was the true proprietor, and no other party was in possession.

The House of Lords ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed; and it is further ordered, that the appellant do pay to the respondent, Sir Alexander Inglis Cochrane, L. 100 for his costs.

*Appellant's Authorities.*—4. Stair, 51. 9.; 3. Bank. 5. 101.; Tod, December 16. 1707, (190.); 3. Stair, 3. 47.; Govan, March 10. 1813, (not rep.); Beveridge, July 10. 1793, (5296.); Kerr, January 19. 1808, (No. 6. App. Adjud.)

*Respondent's Authorities.*—3. Stair, 2. 53.; 3. Bank. 2. 83.

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 22.*)

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No. 18. Sir C. B. CODRINGTON, Executor of the Countess of Bath,  
Appellant.—*Eyllerton—Stephen.*

Sir GEORGE F. JOHNSTONE, and Others, Trustees of Sir JOHN  
JOHNSTONE, Respondents.—*Warren—Murray.*

*Passive Title—Confusion.*—A party having obtained himself served heir-male and heir of line of another, and having intermitted with the rents of an estate to which he had

right as heir-male; and having thereafter, within year and day of the death of the defunct, made up inventories, and brought a ranking and sale of the estate, and paid the debts of the defunct, and taken assignations to them in favour of himself, his heirs and assignees;—Held, (affirming the judgment of the Court of Session), 1. That by his service and intromissions he became universally liable for the debts of the defunct; and, 2. That they were extinguished by his having paid them; and, therefore, that his representatives could not, in virtue of the assignations, recover payment of them from an heir-male who afterwards succeeded to the estate.

March 31. 1824.

SIR JAMES JOHNSTONE was invested in the estate and barony of Westerhall, under titles containing a simple destination to heir-male. On the 8d of September 1794 he died without issue, leaving debts to a considerable amount; and on the 12th of December of that year, his brother, Sir William Pulteney, expedie a general service as heir-male and of line of Sir James, and in virtue thereof took possession of Westerhall, and intromitted with the rents. Thereafter, on the 1st of September 1795, (being two days within the year from the death of Sir James), Sir William made up inventories under the Act 1695, c. 4. He then brought a process of ranking and sale of the estate of Westerhall, of which a sequestration was awarded, and judicial factors appointed by the Court of Session. After some delay, the creditors, whose debts were all personal, having insisted that the estate should be exposed to sale, Sir William paid the debts. The greater part of these debts was paid through the intervention of a trustee, who obtained assignations to them, and thereafter conveyed them by assignations to Sir William, his heirs and assignees. Some of the other assignations were taken directly to himself, and proceeded on the narrative, that they were intended for the purpose of preserving recourse against the representatives of Sir James Johnstone. No farther procedure took place in the ranking and sale, and it was alleged that the estate remained in possession of the judicial factors, who, however, accounted to Sir William, and not to the Court. No steps were adopted by Sir William to impose the debts which he had paid as real burdens on the estate of Westerhall, or to fix them upon the heir-male.

March 31. 1824.

1st Division.  
Lord Gillies.

On the 30th of May 1805 he died, and was succeeded in the estate of Westerhall by his nephew, Sir John Johnstone, as his heir-male, and by his daughter the Countess of Bath in certain other lands, as his heir of line, and in his moveable estate as executrix. She died in July 1808, leaving a will, whereby she conveyed her moveable effects to the appellant, Sir Christopher Codrington, and another gentleman (since dead), as her executors. Thereafter Sir Christopher, as the surviving executor of her Lady-

March 31. 1824.

ship, brought an action against Sir John Johnstone and his trustees, founding on the assignations to the debts in favour of Sir William Pulteney, and to which Lady Bath had right as his executrix; and concluding, that as these were the debts of Sir James Johnstone, Sir John, as representing him in the estate of Westerhall, was liable in payment of them, and ought to be ordained to repay them.

In defence, it was stated, that Sir William Pulteney had incurred an universal representation of Sir James Johnstone, by his service, intromissions, and other acts; that being thus debtor in the debts which he had acquired by assignation, they were extinguished in his person confusione; and that, as Lady Bath represented him universally, while Sir John Johnstone only succeeded as heir-male, the representatives of Lady Bath could have no claim against him for payment or relief of such debts.

On the part of the appellant it was alleged, that the service of Sir William had been obtained, not with the view of incurring an universal representation, but for the purpose of enabling certain debts to be recovered, belonging to a partnership in which Sir James Johnstone had been concerned, and as matter of evidence in a claim for the Annandale Peerage; that accordingly he had made up inventories within year and day of the death of Sir James, under which he had accounted for all his intromissions with the rents prior to the appointment of the judicial factors, and that those which had been subsequently paid to him were not more than sufficient to liquidate the interest of the debts which he had acquired. He therefore contended, that the general service could not, in the circumstances under which it was expedite, infer an universal representation; that neither could the intromissions have that effect; that besides, vitious intromission was not pleadable against the representatives of the intromitter; and therefore, as Sir William was not the universal representative of Sir James, the assignations vested in him and his representatives an active title to insist for repayment from the heir-at-law, who had succeeded to the property.

The Lord Ordinary, on advising condescendences, appointed the case to be debated, and at the same time issued the following note:—‘The Ordinary has considered attentively the very long and elaborate written pleadings in the cause, in which, however, he has never had the advantage of hearing parties at the Bar. It appears to him, that the question chiefly discussed in these papers, as to whether Sir William Pulteney incurred an universal representation by the manner in which he entered heir to his brother, is one which, in whatever way it may be

determined, can have very little effect directly on the decision of this cause; and this not merely as the present is a question inter hæredes, and not with creditors, but because it is admitted that the property left by Sir James Johnstone was more than equal to the amount of his debts. Now, as Sir William Pulteney, whether he entered heir to his brother cum beneficio or not, was undoubtedly liable for his brother's debts to the extent of the property to which he succeeded by his brother's death, it follows that he was liable for the debts in question which fell short of the value of that property. Under these circumstances it seems very difficult, in this view of the case, to hold that the debts which Sir William Pulteney so paid were not extinguished, but were preserved by his taking assignations to the same in favour of himself and of his heirs and general assignees, the persons who, failing himself, were, according to the general rules of law, responsible in the next place for payment of such debts. This is not the case of an entailed estate, where the interest of the heirs in possession, as separate from the heirs of tailzie, is acknowledged and recognized. The estate of Westerhall was limited to heirs-male; but this was only a simple destination, under which, when Sir William Pulteney succeeded, he became proprietor in fee-simple of the estate, and, as such, when he permitted the estate to descend, agreeably to the investitures in favour of the heir-male, he was entitled to impose on that heir any burdens he thought proper. Sir William Pulteney, therefore, by any declaration of his will and intention made habili modo, might have burdened the heir-male with payment of the debts in question; but it remains to inquire, whether the assignations taken by Sir William prove that such was his intention, and whether they amount to such a declaration of his intention as the law will give effect to in this case? In judging of this point, it appears to the Ordinary that it may be of consequence to attend to the circumstances under which the payments were made and the assignations taken by Sir William Pulteney. He had, as the Ordinary understands, previously instituted, and there was then in dependence, an action of sale, brought at his instance, as heir to his brother, under the Act of 1695. The legal object and effect of this action is to render the estate which is the object of it, primarily and solely responsible for the debts of the deceased; and it may therefore be considered whether the assignations, as having been taken during the dependence of this process, may not have a more powerful effect than could have been given to them if no

March 31. 1894.

March 31. 1894. 'such process had been in existence. The question, in this point of view, seems to be not at all argued in the papers, and the Ordinary has therefore ordered it to the roll.'

Thereafter, on hearing parties, and advising memorials, his Lordship pronounced this judgment:—' Finds, that the late Sir James Johnstone, Baronet, died without issue on the 3d of September 1794, possessed of the estate of Westerhall, descendible under a simple destination in the investitures to his heirs-male, and leaving behind him debts to a considerable amount, all of which were merely personal: Finds, that on the 12th December of the same year, Sir William Pulteney, the brother of Sir James Johnstone, expedite a general service as heir-male and of line to Sir James; and finds it proved by the documents in process, that Sir William, subsequent to the service, had intrusions to a considerable extent with the effects of the deceased, and particularly with the rents of Westerhall: Finds, that Sir William Pulteney never procured himself served heir in special to his brother, nor ever made up titles to the estate of Westerhall; but finds, that on the 1st of September 1795, when very nearly a year had elapsed from the death of his brother, Sir William gave up an inventory, with the view of obtaining the benefit thereof in terms of the Act 1695; and in the month of December thereafter, Sir William raised an action of ranking and sale of the estate of Sir James Johnstone: Finds, that said action was never brought to a conclusion, nor were the lands ever sold in consequence of it; but finds, that after raising the process, Sir William, by himself or a trustee, paid the debts in question, which had been due by his brother to a variety of creditors, from whom, instead of simple discharges, assignations were taken in favour of Sir William, his heirs and assignees: Finds, that the assignations do not express the purpose for which they were granted, except in one instance, where the assignation bears to be to the effect that the said Sir William Pulteney may operate his relief of the said sum from the representatives of the said Sir James Johnstone: Finds, that upon the death of Sir William Pulteney, his daughter, the late Countess of Bath, succeeded as his universal heir and representative to all his property, except the estate of Westerhall, which descended to the late Sir John Johnstone, as heir-male both of Sir William Pulteney and of Sir James Johnstone, the person last infeft in that estate: Finds, that Lady Bath having afterwards died, and Sir John Johnstone having made up titles to the estate of Westerhall, the pursuers, as executors of Lady

\* Bath, brought the present action against Sir John, concluding March 31. 1804.  
 \* to have him found liable, as heir-male of Sir James Johnstone  
 \* in the estate of Westerhall, for payment of those debts of Sir  
 \* James which Sir William Pulteney had paid upon assignations  
 \* as before-mentioned: Finds, that whatever may have been Sir  
 \* William Pulteney's motives or object in serving himself heir-  
 \* male or of line to his brother, these can be of no consequence  
 \* in judging of the legal effects of his service; and finds, that by  
 \* his said service and subsequent intromissions, Sir William Pul-  
 \* teney incurred an universal representation, from which he could  
 \* not be relieved by his afterwards giving up inventories and  
 \* bringing a process of ranking and sale: Finds, that notwith-  
 \* standing the universal representation which he had thus in-  
 \* curred, Sir William Pulteney, if he had made up titles to the  
 \* estate of Westerhall, might have had it in his power to burden  
 \* the heir succeeding to him in that estate with payment of the  
 \* debts in question; but finds, that the necessary steps for that  
 \* purpose were not taken by Sir William: Finds, that it does  
 \* not appear, either from the assignations taken by Sir William,  
 \* or from any other part of his proceedings, that he really had  
 \* the intention of making Sir John Johnstone liable to relieve his  
 \* heirs of the debts in question; and finds, at any rate, that if  
 \* such was his intention, the same has not been carried into  
 \* effect. Therefore sustains the defence, assolzie the defenders  
 \* from the hail conclusions of the libel, and decerns.\*

The appellants then reclaimed, but the Court, on the 14th  
 November 1817, refused the petition without answers; and on  
 the 14th day of February 1818 they adhered, on advising ano-  
 ther petition with answers.\*

The appellant then entered an appeal to the House of Lords,  
 and maintained that the judgments were erroneous, for these  
 reasons:—

1. Because Sir William Pulteney, not having incurred, in re-  
 lation at least to heirs, (whatever might be the effect in a ques-  
 tion with creditors), a representation by his service or intromis-  
 sions, beyond the extent of the inventory and the amount of the  
 intromissions, he did not thereby become universally liable for  
 Sir James Johnstone's debts as heir-general: that, consequently,  
 by having paid these debts, they were not extinguished confu-

\* See Fac. Coll. 11th February 1818, where it is stated, that 'the Court were  
 clearly of opinion that, in consequence of having served before making up inven-  
 tories, Sir William had incurred an universal representation.'



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sione; and as he had taken assignations in favour of his heirs-general, they were available to them against the heirs-male succeeding to the heritage, and representing the contractor of the debts. And,

2. Because, even if Sir William Pulteney had by his service incurred an universal representation as heir-general and heir-male, still it was competent for him, in the character of heir-male, to pay his brother's debts, and to render them available to his heirs of line against the heirs-male succeeding to Sir James's estate; and that the mode in which he had done this,—by taking assignations to these debts in favour of his heirs-general,—was both sufficient evidence of his intention to render them so available, and a competent mode of preventing their extinction confusione.

On the other hand, it was maintained by the respondents,—

1. That Sir William Pulteney, by his service as heir-male and of line to Sir James Johnstone, and by his intromissions with the estate, had incurred an universal representation, whereby he was personally liable for all his debts: that from the moment he was served he ceased to be an *apparent* heir, and as it was only competent for an apparent heir to limit his responsibility by making up inventories, he could not do so, seeing that he was not an apparent but an *entered* heir. And,

2. That as Sir William represented Sir James universally, and thereby became the proper debtor in his debts, and as he actually paid them, they thereby became extinguished confusione, and could not be kept up by obtaining assignations to them; and that the more especially, as he had done no act whereby to fix these debts, either upon the estate or upon the heir-male succeeding to it.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of affirmed.'

*Appellants' Authorities.*—1. *Stair*, 6. 5.; 3. *Ersk.* 8. 91.; 6. *Code*, 30. 25. § 2.; 1. *Stair*, 18. 9.; 1. *Ersk.* 4. 29.; *White*, June 10. 1673, (5207.); 3. *Stair*, 5. 21.; *Allan*, January 25. 1715, (3566.); *Maxwell*, July 12. 1717, (5210.); *Robertson's App. Ca.* 539.; 3. *Ersk.* 4.; *Kerr*, February 15. 1758, (15,551.)

*Respondents' Authorities.*—3. *Ersk.* 8. 52.; 3. *Stair*, 5. 17.; 3. *Ersk.* 4. 28.; 1. *Stair*, 18. 9.; *Sir W. Forbes and Company*, November 17. 1802, (No. 10. *App. Tailzie*); *Johnston*, July 21. 1679, (3042.); *Robertson*, November 27. 1751, (3044.); *Campbell*, February 17. 1747, (5217.)

WILLIAMS, BROOKS, and POWEL—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No. 23.*)

JAMES MILLER, and Others, Trustees of the late JOHN HAGGART,  
Esq. Advocate, Appellants.—*Murray—Abercromby.*

No. 19.

Right Honourable CHARLES HOPE, Lord President of the Court of  
Session, Respondent.—*Attorney-General Copely—Menzies.*

*Jurisdiction—Reparation.*—Held, (affirming the judgment of the Court of Session),  
That an action of damages is not competent against a supreme Judge, for a censure  
passed by him, while acting in his judicial capacity, on a Counsel practising at the  
Bar, and engaged in the cause then before the Court, although it was alleged that  
the censure had been made injuriously, and from motives of private malice.

THE late John Haggart, Esq. advocate, a practising lawyer at  
the Scottish Bar, conceiving that he had been injured by certain  
remarks made from the Chair by Lord Justice-Clerk Hope, after-  
wards Lord President, on advising a cause in which he was counsel,  
raised an action against his Lordship, in which, after narrating  
that he had been for thirty years at the Bar, during which period  
there had been five Judges in the Chair, by none of whom he had  
ever been censured, proceeded to state the circumstances in these  
terms :—‘ That, in the year 1809, a cause between the Duke of  
‘ Athole and General Robertson of Lude depended before the  
‘ Second Division of the Court of Session, wherein the Right  
‘ Honourable Charles Hope then presided as Lord Justice-Clerk.  
‘ That the Honourable Henry Erskine, Mr Matthew Ross, Mr  
‘ John Clerk, and the pursuer, were counsel for General Robert-  
‘ son ; and it being deemed proper to submit an interlocutor pro-  
‘ nounced by the Lord Ordinary to the review of the Court, the  
‘ task of preparing a petition devolved on the pursuer. That after  
‘ the petition was prepared, it was laid before the Dean of Faculty,  
‘ who revised and corrected the press-copy. That when the peti-  
‘ tion was put to the roll, it was appointed to be answered, and  
‘ no animadversion was made on any of the expressions contained  
‘ in it. That when the petition and answers came to be advised,  
‘ the Right Honourable Charles Hope, Lord Justice-Clerk, not  
‘ only censured expressions used in the petition, but expressed  
‘ himself towards the pursuer in terms that greatly hurt his feel-  
‘ ings. That on the 11th of April 1809, the pursuer wrote his  
‘ Lordship, calling to his recollection the expressions he had made  
‘ use of, and expressing a hope that an explanation would be  
‘ given. He received the following answer :—“ Granton, 12th  
‘ April 1809. SIR,—I have the honour to acknowledge the

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2D DIVISION.  
Lord Pitmilley.

April 1. 1824. ' receipt of your letter of yesterday. If I thought that I were  
 ' bound to give any kind of private explanation to any human  
 ' being for what I may say or do on the Bench, I should consider  
 ' myself as, from that moment, surrendering my independence,  
 ' and forfeiting all title to the confidence of my country. Do not  
 ' suppose, Sir, from this, that I wish to arrogate to myself an  
 ' exemption from all responsibility for what I may say on the  
 ' Bench; on the contrary, I know that I am responsible, and I  
 ' hope I shall always act under the conviction that I am so. But  
 ' it is a legal and public responsibility only to which I will submit."  
 ' That a question afterwards depended before the First Division  
 ' of the Court, between the Duke of Athole and Mr Leslie of  
 ' Butterstown, relative to a large extent of pasture ground; and  
 ' the Honourable Henry Erskine, Mr Matthew Ross, Mr John  
 ' Greenshields, Mr Duncan Macfarlane, Mr Henry Cockburn,  
 ' and the pursuer, were counsel for Mr Leslie in this cause.  
 ' That it was the opinion of all the counsel that Mr Leslie would  
 ' be successful; but difficulties arose, in point of form, from two  
 ' interlocutors pronounced by the Lord Ordinary that did not  
 ' apply to the shape of the cause; and it became necessary to  
 ' apply several times to the Court, with the view of removing  
 ' these difficulties; and none of the statements or expressions in  
 ' the petitions were censured. That it being deemed expedient  
 ' to present a petition to the Court on the merits of the cause,  
 ' the process was laid before the pursuer to prepare it; and that  
 ' he might be enabled to do justice to his client, and state the  
 ' cause fully to the Court, he went to the ground in dispute, and  
 ' took down notes explanatory of all the points in controversy.  
 ' That, after this, he framed a petition with his own hand, and  
 ' transmitted it to Edinburgh, where it was printed and boxed  
 ' the 10th of September 1812. That the petition was moved by  
 ' Lord President Hope on the 17th November 1812, when his  
 ' Lordship turned to the 28d page of the petition, and read the  
 ' interlocutors of the Lord Ordinary, dated the 11th June 1808,  
 ' and 24th May 1809; and, without reading the statement in the  
 ' petition to which he alluded, his Lordship expressed himself  
 ' in the following terms, or used words of the same import:—" I  
 ' do not know what the intellects of the gentleman who framed  
 ' this petition are, or what he conceives ours to be; I do not  
 ' know what his candour may be, or what he expects ours to be,  
 ' when he states that the second condescendence was not appoint-  
 ' ed in terms of the Act of Sederunt." That, by using these  
 ' expressions, the audience, which was numerous, with the ex-

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ception of the few who had read the petition, must have conceived that his Lordship not only considered the pursuer deficient in intellect, but devoid of candour, and that he had deliberately misrepresented the terms of the Lord Ordinary's second interlocutor. That what was stated in the petition, and to which his Lordship alluded, was in the following terms:—"His Lordship appointed the pursuer to give in a condescendence, in terms of the Act of Sederunt, of what he offers to prove in support of the several conclusions of his libel; and when given in, allows the defender to see and answer the same. And a short representation being presented in the possessory question, his Lordship sisted procedure till the process of reduction comes to be advised.' A condescendence of six pages was accordingly lodged; but the answers were argumentative; and extended to 15 pages; and his Lordship appointed both processes to be enrolled, that they may be conjoined, and an interlocutor pronounced in the whole cause. The processes were enrolled, and his Lordship conjoined this process with the possessory process; and in the conjoined actions appoints the pursuer, John Lealie, to give in a more specific condescendence of what he offers to prove in support of the conclusions of his libel.' As the condescendence was not appointed to be framed in terms of the Act of Sederunt, and the respondent had not confined himself to facts in his answers to the former condescendence, it was deemed expedient, in the condescendence that was now appointed, to meet and obviate what was stated in the answers to the first condescendence; but his Lordship, under the impression that he had appointed a condescendence in terms of the Act of Sederunt, pronounced the following interlocutor."

After mentioning that a similar statement had been contained in a previous petition, which had not been censured, and that, if what was stated had been read, it would have appeared to the audience that Mr Haggart had no intention to misrepresent the terms of the Lord Ordinary's interlocutor; that they had been transcribed, and that the reason for not framing the condescendence in terms of the Act of Sederunt was fairly stated; the summons proceeded in these terms:—"That the censure was therefore unmerited, and the injury the pursuer sustained was aggravated by his Lordship not reading the passages in the petition to which he alluded. That his Lordship next turned to the 29th page of the petition, and, without reading the passage he intended to censure, or explaining that he merely

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‘alluded to what was there stated to have been the opinion of  
‘ Lord President Blair, when the first petition was moved on the  
‘ 18th February 1811, and a short petition, requesting an expla-  
‘ nation of the interlocutor written on the first, was moved on the  
‘ 9th March 1811, his Lordship expressed himself in the following  
‘ terms, or used words of the same import :—“ Mr Haggart has  
‘ here, as is his usual practice, stated facts and circumstances of  
‘ which there is no evidence on the record, and which live in the  
‘ memory and recollection of that gentleman alone. Mr Haggart  
‘ has conducted this cause, as he does all the others he is con-  
‘ cerned in, differently from all the other counsel at the Bar.”  
‘ That none but those who had read the petition could be aware  
‘ that his Lordship here alluded to what was reported to have  
‘ been Lord President Blair’s opinion; and all the rest of the  
‘ audience must have been impressed, that the pursuer had stated  
‘ facts and circumstances relative to the merits of the cause, of  
‘ which there was no evidence, written or parole; and although  
‘ the pursuer was not directly accused of stating falsehoods of his  
‘ own invention, that was the inference resulting from the words  
‘ spoken by his Lordship. That if his Lordship had communi-  
‘ cated, that he merely alluded to the report given in the petition  
‘ of Lord President Blair’s opinion, every practitioner present  
‘ would have been aware that no record of such opinions is kept,  
‘ and that they are made from notes taken by counsel or agents;  
‘ and it would have appeared to every practitioner present, that  
‘ the words used by his Lordship were inapplicable, and the  
‘ censure far greater than the offence merited, if the pursuer had  
‘ committed an error in his notes, and given an inaccurate report.’  
- It was then stated, that there was satisfactory evidence that  
the report was correct; that the statement was transcribed from  
a former petition, drawn by Mr Greenshields, which was not  
censured; that, however, ‘ his Lordship did not limit his censure  
‘ to the case under consideration, but accused the pursuer of  
‘ inventing and stating facts of which there was no evidence in  
‘ all the causes he was concerned in; and it was imputed to him  
‘ that he had misconducted the case of Mr Leslie, and every  
‘ other case he was employed in from the moment that he came  
‘ to the Bar. That it belonged to his Lordship to censure the  
‘ petition under the consideration of the Court, if it was censur-  
‘ able, and his Lordship was entitled to censure the pursuer, in  
‘ so far as he was concerned, if the cause had been misconducted :  
‘ but his Lordship was not entitled to stigmatize the pursuer’s  
‘ whole conduct at the Bar; and it was unjust to charge him

' with the whole misconduct of the case under consideration, as April 1. 1824.  
 ' it appeared from the record that other counsel were employed.  
 ' That the censure was the more unjustifiable, as his Lordship  
 ' came later to the Bar than the pursuer, and was only acquaint-  
 ' ed with a limited part of the pursuer's practice; and his Lord-  
 ' ship did not, and could not, mention any instance where the  
 ' pursuer invented or misrepresented a fact in any cause in which  
 ' he ever was concerned. That the said charge or censure was  
 ' aggravated by the tone and manner in which it was delivered.  
 ' That the pursuer, intending to justify his conduct in the face  
 ' of the Court, and of the audience, rose up for that purpose,  
 ' when he was stopped by the said Lord President, who said,  
 ' —" I conversed with my brethren on this subject in the robing  
 ' room, and the opinion I have delivered is that of the whole  
 ' Court." That it was not the opinion of the whole, or any of  
 ' the Judges, that the pursuer deserved the harsh and injurious  
 ' censure pronounced by the said Lord President. That, after  
 ' taking down the words his Lordship had used, and shewing  
 ' them to several gentlemen who were present, the pursuer trans-  
 ' mitted the paper to his Lordship, requesting of him, if any  
 ' errors were committed, to correct them. That his Lordship  
 ' returned an answer, which will be produced in the proceedings  
 ' to follow hereon, in which he said,—" Your note conveys per-  
 ' fectly the sense and substance of the passages of my speech to  
 ' which you allude." That the pursuer then wrote his Lordship,  
 ' and expressed a hope that his Lordship would deem it proper  
 ' to give an explanation. That the pursuer also expressed a  
 ' wish that the letter he addressed to his Lordship might be  
 ' communicated to the other Judges. That the following answer  
 ' was returned :—" Edinburgh, 5th December 1812. SIR,—On  
 ' mentioning the matter to my brethren this morning, they did  
 ' not think it incumbent on me to have any farther correspon-  
 ' dence with you on the subject of your letter; and that opinion  
 ' coinciding entirely with my own, I have to request that you  
 ' will consider this as the last and only communication you will  
 ' receive from me." That his Lordship having refused to give  
 ' any explanation of the unwarranted expressions used by him,  
 ' or make any reparation for wounding the pursuer's feelings, or  
 ' injuring his private and professional character, he is laid under  
 ' the necessity of seeking redress in the manner pointed out by  
 ' his Lordship.' The summons therefore concluded, that it  
 ' should be found that the expressions were unwarranted and  
 ' injurious, and that his Lordship should be found liable in

April 1. 1824. L. 5000 of damages. An amendment of the summons was afterwards made, by alleging that the expressions had been used maliciously, and from 'motives of private malice,' and 'for the purpose of injuring the pursuer in his professional character.'

Subsequent to the above action being brought into Court, his Lordship having again from the Chair made certain reflections upon Mr Haggart for his conduct as counsel in another cause, Mr Haggart brought a second summons, in which the circumstances were stated in these terms :— ' That he was requested by ' Mrs Belinda Edwards, widow of Colonel George Colebrooke ' of Crawford-Douglas, presently spouse of John Taaffe, Esq. of ' Smarmore Castle, to prepare answers for her to two petitions ' presented to the First Division of the Court of Session by ' Richard Mackenzie, writer to the signet, and others. The ' two petitions which were to be answered, and a variety of papers ' which it was necessary to peruse, were only put on the pursuer's ' table on Friday the 24th day of February last ; and as the cause ' was put to the roll for advising the day following, it was impos- ' sible for the pursuer to prepare the answers. That when the ' two petitions were moved, on Saturday the 25th day of Feb- ' ruary, the Court prorogated the time for lodging the answers ' till Monday immediately following, and appointed the petitions ' to be put to the roll on Tuesday, with or without answers. ' That the cause was of great importance to Mrs Taaffe, and the ' time allowed for preparing the answers was too short ; but the ' pursuer used every effort he could, and answers were prepared ' and printed on Monday ; the advising of the two petitions and ' answers was postponed till Wednesday the 1st of March ; and ' before any opinion was delivered, the pursuer stated, that the ' time allowed him for preparing the answers was so limited, that ' he was aware he had not done full justice to his client, and that ' the answers were imperfect. That one of the Judges having ' referred to two passages in the answers, one of them as being ' injurious to Mrs Lee of Hill-street, Edinburgh, and the other ' as injurious to the said Richard Mackenzie, the pursuer imme- ' diately stated, that he had no intention of introducing any thing ' injurious to Mrs Lee or Mr Mackenzie, and moved that the ' passages referred to might be expunged. That the Right ' Honourable Charles Hope, Lord President, who had on ano- ' ther occasion unwarrantably traduced and vilified the pursuer, ' now, from motives of private malice, and for the purpose of in-

'juring the pursuer in his professional character, said,—“ I have April 1. 1894.  
 'never seen such low wit, vulgar abuse, scurrility, and buffoon-  
 'ery, as in these answers. It is painful to think the Bar of  
 'Scotland has furnished a man capable of writing such a paper.”  
 'That after his Lordship had uttered part of those injurious  
 'epithets, the pursuer requested to be allowed time to take down  
 'the words spoken, when his Lordship said,—“ I will repeat  
 'them three times over ;” and after doing so, he said,—“ I shall  
 'attest them for your satisfaction, if you take down accurately.”  
 'That a paper, containing the epithets uttered, being next day  
 'handed to his Lordship on the Bench, he, after reading it,  
 'wrote the following words at the foot thereof:—“ The above  
 'seems to me to be correctly the substance of what passed,  
 '(signed) C. HOPE ;” which paper will be produced in the pro-  
 'ceedings to follow hereupon. That the time the pursuer had  
 'to prepare his answers being much shorter than is usually  
 'given, and he having apologized for any imperfections in the  
 'answers before any opinion was delivered from the Bench, and  
 'having craved that the passages which were pointed out as ex-  
 'ceptionable should be expunged, it is manifest the above expres-  
 'sions must have been used from a malicious intention, and for  
 'the purpose of injuring the pursuer in his professional and pri-  
 'vate character ; and this will farther appear on perusal of the  
 'answers, which, if they merited any censure at all, under the  
 'circumstances in which they were prepared, did not merit those  
 'vilifying epithets which were uttered, and, after a deliberation  
 'of twenty-four hours, were abidden by and attested by the said  
 'Right Honourable Charles Hope. That the offence was ag-  
 'gravated by using the above defamatory expressions during the  
 'dependence of a previous action, brought by the pursuer against  
 'the said Right Honourable Charles Hope for a similar offence.'

He therefore concluded, that it ought to be found that the  
 expressions were 'unwarranted, malicious, and injurious,' and  
 that his Lordship should be ordained to pay L.5000 of damages.

Against the first of these actions his Lordship lodged these  
 defences :—‘ The statement contained in the libel is inaccurate.  
 'in many respects. But the defender conceives that it would be  
 'improper in him to go into any explanation, in this process, of  
 'the circumstances on which he delivered his opinion as a Judge.  
 'It is sufficient to say, that, on the occasions libelled, he acted  
 'in the discharge of his judicial duty ; and therefore, even upon  
 'the supposition that the statement were accurate, nevertheless.



April 1. 1824. 'the present action of damages is groundless. Therefore the defender ought to be assoilzied.'

The same defence was also lodged in the second action, and it having been conjoined with the previous one, the Lord Ordinary, after hearing parties, assoilzied his Lordship, and, on advising a representation, pronounced this interlocutor:—' Finds, that an action of damages cannot be maintained at the instance of an advocate against a Judge of this Court, on the ground of injury alleged to have arisen from a censure passed in Court on such advocate for his manner of pleading a particular cause: Finds, that an allegation of private malice having been the motive of the Judge in inflicting the censure complained of, does not render the action competent; and that proof of alleged malice is therefore inadmissible: And further finds, that although the pursuer in this action libels malice, yet he has not suggested in his pleading any proof, or offer of proof, of this charge; and that the existence of the alleged malice is merely inferred by the pursuer from the words used, and from censures having been pronounced against him by the defender more than once: Finds, that the charge of malice which is thus made, is laid on grounds which are insufficient to prove the charge, even were such an action competent, when malice is libelled, and relevant proof of it is offered;' and therefore adhered.

Against this judgment Mr Haggart reclaimed; but before the cause was advised he died, and the appellants, his trustees, (who had been enjoined by him to prosecute the actions), were thereupon sisted as parties.

On advising the petition with answers, *Lord Craigie* observed:—In this case, when the petition was moved, it appeared to me that we should have seen the terms in which the original pursuer directed his trustees to prosecute the action; and unless these directions had been made a condition of the settlement, I think that the trustees were called on to exercise their own discretion in carrying on the action; and I think in such a case it might have been proper for the defender to have insisted on their giving their oath of calumny. If they had been so called on, I am satisfied that the action would not have been proceeded in, as being neither expedient for the purpose which Mr. Haggart had in view for clearing his own character, nor just to the other party.

But if we are called on to decide the question, my opinion is, that the interlocutor is substantially right; but there are some findings in it with which I cannot agree:—1st, That there can be no action against a Judge in this Court for censure passed

on a counsel. I conceive that finding to be a great deal too broad. There is no privilege competent to the members of this Court, more than of any other Court. There is, and must be, a difficulty as to who are to review their conduct, and in some cases it may be impracticable; but I do not see that there is any distinction between superior and inferior Judges; and I think Judges or lawyers may be sued for damages for malversations creating an injury to a practitioner before the Court. If a Judge, for example, in this Court, were to say that he could pay no attention to what a counsel said for a prisoner because he was guilty of the same offence, I think, in such a case, which may be supposed, the Judge would be liable to an action. April 1. 1824.

In the 2d place, I cannot agree with the finding, that it is necessary to prove malice exclusively of the act itself. I think the act may be of such a nature as to prove malice of itself, so as to make it unintelligible without supposing malice. On these points I think the interlocutor goes too far. At the same time, if I were called on to decide the point in this case, I would say, that the words do not import malice. They are strong, no doubt, but they were said on the spur of the occasion, and I think were meant, not so much to injure the party, as to express the indignation the Judge felt at the proceedings. In that view the case ought to be decided as the Ordinary has done. But I must go further, and I say, that in order to authorize a prosecution of this kind, other measures ought to have been adopted; the words should have been minuted at the time, and the pursuer should have taken the opinion of the rest of the Court if he was injured or not. The injury might thus have been ascertained, and, in addition to taking away the censure, whether there was room for an action of damages. But the presumption is, that the Court did approve of, and go along with the Judge in what was said. But, under all the circumstances, I think no proceedings can be held in this action. If loose expressions, used in the course of an argument or an opinion, are to be decided on, not by those Judges who sit along with the Judge who used them, but by others, I think it is inexpedient. I can conceive a case where an action could not even be brought. In the case of a judgment pronounced by a Court, consisting of a number of members, could they try themselves? It would be necessary to have an impeachment, or a bill of pains and penalties. But in a case like this, if any injury has been done, the proper steps were not taken to enable the party to bring his action.

*Lord Robertson.*—This is an action originally brought by Mr

April 1. 1824. Haggart, and now insisted in by his trustees, the object of which is to recover damages from the President of this Court, on account of certain words used by him while sitting on the Bench, and in his judicial capacity, as to the conduct of an advocate in a particular cause, about which the Court were deliberating. The defence that is made to this action is of a preliminary nature. (His Lordship then read the defence). The Lord Ordinary has sustained that defence, and the case comes before us to review that judgment. It appears to me that this action is altogether incompetent, and that it is impossible for us to entertain it, unless it can be shewn that, if the defender were to enter on his defence, we have sufficient jurisdiction. This Court, like every other Court, from the highest to the lowest, must have a superintendence over those who practise before them. The Court has, and must have, from the nature of the thing, and has always, exercised a superintendence over those practising before them for their conduct in their professional capacity. This is sometimes done by way of censure, sometimes in a more severe way. It cannot therefore be said, that the defender was exercising a power not competent to the situation he held when he censured a person practising at the Bar of the Court. This power is, from its own nature, entirely discretionary; and the exercise of it, and the mode in which it is exercised, must depend on the discretion and sound sense of the Judges. The basis of the pursuer's plea, therefore, must be, not an allegation that the defender had been exercising a power not belonging to him, but that he had been exercising it unduly; that he had gone ultra rectas metas of his power; that he had pronounced a censure more severe than what was due; or that it was greater than the cause or the offence, if any, required. It will be observed, as to the first action, that all the Judges concurred in the censure; for it is said, 'The opinion I have delivered is that of the whole Court.' If it was therefore competent to call the Lord President in an action, it was also competent to call the whole Judges; and if the action is competent before us, we are to have the whole Judges of the First Division at the time brought before us for words spoken in their judicial capacity. This appears entirely anomalous, without precedent, and would lead to most dangerous consequences. If Judges in any Court were liable to be called to account for words spoken in their judicial capacity, it may be said, in the words of Lord Stair, 'No man but a beggar, or a fool, would be a Judge.' But if this action be competent, before what Court is it competent? It is an action for an injury by verbal slander. Is not an

action of that kind competent before the Commissaries? And yet if such an action were brought before them, is it possible to maintain, that that, or any inferior Court, are to judge of words spoken in a superior Court? But it is said, that that argument is not applicable, because the action is brought before a supreme Court. But what power have we to take cognizance of what the Judges of the First Division have done? If any Judge of the Supreme Court shall, in his individual capacity, do any thing subjecting himself to the laws of his country, either civil or criminal, he must be dealt with as any other person. But there is nothing making it competent for us to judge whether the conduct of the Lord President was proper or not, whether the censure was merited, whether it was more than the offence deserved, or if the Court acted with a sound discretion in inflicting it. But it is said, that there is no wrong without a remedy. No doubt that is the case, and I hope it will ever be so. But it must be a constitutional remedy, consistent with the rights of the Supreme Court. If any Judge, either judicially or not, should commit a wrong, God forbid there should be no remedy; but then the redress does not lie with us; it is by application to the King in Council or to Parliament. In my opinion, the interlocutor is right, and we have no power to alter it.

*Lord Glenlee.*—I agree very much with what was said by Lord Craigie. I was for seeing the petition, because it appeared to me, that the grounds of defence went a great deal further, in freeing Judges from an action on account of malversations, than I was disposed to go. I am aware that, if mere iniquity is alleged—of the Judge having done a thing which he was entitled to do, but having done it in a way not called for—that is, merely an erroneous performance of an act otherwise legal; I think, without entering into the distinction of higher or lower Courts, no action would lie. But if I offer a separate proof that the Judge has been bribed to pronounce an erroneous judgment, though he might not be amenable for the erroneous judgment, yet if I can instruct that a bribe was actually given, I would have little doubt in that case that an action would be competent. But, where the only thing complained of is, that the Judge has performed a judicial act in an improper way, there, I think, it would not do to allow an action. But, if you came to a Judge going *ultra vires*, though it may still bear the character of a judicial act, I think he would be responsible. For instance, it would be a judicial act if we were judging of a supersedere of diligence, and we were to allow it, though not allowed by the statute: this

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April 1. 1824. would be a judicial act; and yet, by the words of the statute, we would be all liable as cautioners for the debt. What the form of process would be for making us liable, it is not my business to say till the case comes before us; but just the same sort of process might be used for recovering damages where the Judge has gone ultra vires. But I think there is not sufficient stated in the libel here to support it. There can be no doubt that a Judge is allowed to censure a practitioner, and to put that censure on the record. But he is also entitled to give his opinion of a paper or a speech, and of the manner of the practitioner's conducting himself: and if he really and truly believes it, I know nothing to prevent him saying so. The only point a little doubtful, is with respect to the particular expression in one of the libels, not alluding to the case then before the Court, but to the general conduct of the original pursuer at the Bar. But it appears to me, that the libel excludes the possibility of saying any thing about it; because it appears that, when Mr Haggart rose for the purpose of remonstrating against it, he was told that it was the opinion of the whole Court, and there was no contradiction of that made by any of the Judges; and therefore it had the sanction of every one Judge: and if any of them thought otherwise, and, when this declaration was made, that it was the opinion of the whole Court, sat still without saying any thing, I think they were ten times more to blame than the President for saying it. But as, by the shewing of the libel, this injury was not done by him individually, but by the whole Court, I have great doubts if an action against him could be listened to, even supposing that this allusion to his general conduct was competent for a Judge to use, which is the most doubtful question. One Judge may use more gentle language, and another more severe; but there is nothing which you can say a Judge was not entitled to say, if he really believed it.—I have nothing further to add to what Lord Robertson has said.

*Lord Bannatyne.*—In a case of this kind, I think it is necessary that every Judge should express the grounds of his opinion. It is not necessary to say any thing as to the origin of this action; the only point is, whether it can be maintained. My opinion coincides with that of the Lord Ordinary, as expressed in his interlocutor. It belongs to every Court to regulate the practitioners at their Bar. As to an inferior Judge, we all know where the remedy lies for malversation; the superior Court will apply the remedy. But it is another question when the abuse has taken place in a Court like ours, composed

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of many members, and whose judgments are not subject to any review in this country. There must either be no remedy, by civil action, or it must lie in the Court itself; but it does not follow that the remedy must lie in that Court. He would have a remedy, but I have no idea that it would lie here. It is of no consequence whether it was the head of the Court or not that expressed his opinion of the conduct of a practitioner at the Bar. Though a single Judge does it, it is in presence of the whole Court; and if they thought he did wrong, they would have expressed their opinion in one way or another. One Judge may say a thing more hastily than another; but if the rest of the Court acquiesce, the whole Court are implicated, and it must not be considered as done by an individual Judge. Will any man say, that, if it were a single Judge, action could be brought against him before himself! This Court cannot judge of an action against themselves. And I am confirmed in the opinion I have given by the fact, that for 300 years since the Court has subsisted, there has been no such action. If it had been competent, there must have been some such cases, and we would have had many instances. I must make another observation, that nobody supposes that the Bar has suffered any injury for want of a remedy in this Court. This Court is as much interested as the Bar is, in the preservation of their privileges. The liberty allowed to the Bar has seldom been abused, but where it is, it is the duty of this Court to repress it. There is no wrong here without a remedy; the Bar have enough of knowledge to tell them where the remedy lies; and if they were called together, they would decide that the remedy could not lie in this Court.

*Lord Justice-Clerk.*—When this petition was moved, I took the liberty of stating shortly the grounds leading me, even on the petition, summons, and defences, to the opinion that the petition ought to be refused; but as it appeared to your Lordships, from the novelty of the case, that it was better to have an answer on the record, you ordered it to be answered; and I do not regret that that step was taken, as it has led, not only to a full answer, but to deliberate opinions on the case by your Lordships. I should have considered the case of infinite importance indeed, if you had had any hesitation as to the judgment to be pronounced; because I should have considered, that the sustaining an action of this anomalous and unprecedented nature, would have been one of the greatest innovations since the institution of the College of Justice. But, in consequence of the opinions expressed

April 1. 1894. by all of your Lordships, there is no risk of establishing such dangerous prosecutions. I say dangerous, not with reference to the individuals who may fill the Chairs of this Court, but I state it advisedly and confidently, most dangerous to the interests of the country. For if I considered it as sanctioned by your Lordships, that, when either a party or a practitioner should conceive himself injured by what is said by a Judge in his judicial capacity, and warranted to charge malice, he should be entitled to bring an action of this kind, no man can doubt that there would be a total end to the independence, dignity, and security of Courts of Justice. We can never lose sight of this, that both of the summonses (and I may notice both, though we are at present considering only one of them, as the other has been superseded) are rested on the basis, that the injury complained of was the act of the head of this Court sitting in judicio; not any private slander, not any act of defamation committed extrajudicially, but founded on the conduct of that Judge in the discharge of his sacred office. I never can lose sight of the fact, that, take the case in any aspect, view it as held out in the petition, you never can see any thing but an action for an injury rested on the judicial proceedings of a Judge in the discharge of his sacred office. It has not been denied, but admitted, both in the summons and in the petition, that the censorial power of this Court, and of every other Court, even of inferior Courts, is an unquestionable proposition, because no lawyer can entertain a doubt upon it; and your Lordships must be aware, that, as we are sworn to discharge our duties faithfully, if, in cases where a censure is required, we shrink from inflicting it, we are as guilty as if we pronounced an unjust judgment. This is most unquestionably an action for a judicial act; therefore I am decidedly of opinion, that we are just called on to decide this case in the same situation as if we were sitting in the Court of Session before its Division—that we, the fourteen Judges of the Court of Session, might have been called to entertain an action against our own head for what was done by him in the presence of the whole Court. The Division of the Court makes no difference in the case; for as Lord Robertson has most correctly observed, the Judges of one Division have no power on earth to review the decisions of the other. But then it is most correctly observed by some of your Lordships, that if this is a competent action on the face of these summonses, it is equally competent in the Commissary Court, which indeed is the proper forum for actions of defamation; and therefore we must carry the doctrine to this extraordi-

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mary conclusion, that it is competent to bring the head of this Court to answer at the Bar of the Commissary Court for an act in his judicial capacity. That is the inevitable result if you sanction this action. But I have already observed, that the power of censure is admitted; the case is therefore made still narrower, because the action is rested on an allegation, that there has been an undue excess of the exercise of this power; and therefore it must be maintained, that the question as to the degree of the censure is to be submitted to consideration either here or in the Commissary Court, or submitted to another tribunal, to the cognizance of a jury of twelve men, taken by accident, to try whether a Judge of a Supreme Court, in the performance of his sacred duty, and which, if he had omitted, he would have been guilty of a dereliction of his duty, has exceeded the measure of his duty in the opinion of these twelve men. The very enunciation of this, which I hold to be the inevitable result of entertaining such an action, must convince every reasonable man that you will do irreparable injury, not to the Judges, for that is nothing, but to the country at large. You will degrade the situation of a Judge of this Court into the low mean situation, so well described by Lord Robertson in the words of Lord Stair. But it is of some consequence, in a case of this kind, that, with all the anxiety and pains that have been taken as to this dying legacy, and, it is evident no common pains have been taken, no vestige of authority, either in the opinions of Judges, in the statute law, or in the decisions, have been pointed out. I should therefore conceive that that circumstance, with the total absence of all precedent, is a good illustration that such actions have never been considered competent. Your Lordships will not suppose that I mean to say any thing as to my not supposing possible, that any Judge, acting palpably *ultra vires*, may not be liable in reparation in the proper way. I am not called on to give an abstract opinion on such a case; all such cases must be viewed as extremely delicate cases: upon such extreme cases I shall reserve my opinion till they do occur. But as to any thing appearing on the face of the act, an act done under the controul of the Court, and in reference to the particular case before the Court, I have not a doubt that there is no foundation for maintaining that any such action can be sustained. And I humbly conceive, that it is of importance to notice that no such actions are countenanced by the law of England. If any thing is discoverable from the authorities, the principle is carried farther there than is necessary for deciding this case. There is one observation I



April 1. 1824. may make, that if ever there was a case in which such an action could be listened to, it might have been attempted in a recent case before Justice Best. I allude to the trial of Davidson, in which the person, choosing to be his own advocate, conducted himself in such a way that the Judge was forced to fine him three different times, to the amount, I believe, of L. 100. In the course of the trial the tone of the defender was considerably altered, and his Lordship remitted the fine. But, put the case that this person, instead of betaking himself to the course he did, by trying to get a new trial, or even presenting a petition to the House of Commons, had brought an action of damages, and, according to the argument here, nothing more is requisite than to libel malice, and what would have been more easy than for him to say that it was done from malice? But was that ever dreamt of, or was it ever thought that this, which was the act of the Judge, would support such an action? I say, therefore, that as the fining for misconduct is an extremely close parallel with the case of censure, it is clear that, by the law of England, no such action is allowed.

I have just one observation more to make. I have looked at the summonses, and attended to the words used, all accompanied with a statement as to what led to the conduct of the Court. All and each of them apply to the particular cases then before the Court. No doubt there is one of them, which alludes to the mode in which that case was conducted being according to the mode of conducting cases by that gentleman. I am not prepared, in reference to the way which, upon the face of the summons, that ground of action is stated, to say that this, which is supposed to be an excess of power, can be viewed as such; because I am bound to say, that if any practitioner has a peculiar mode of conducting himself as to judicial procedure in every case, and it becomes necessary for a Judge to take notice of it in the case then under consideration, that if that Judge is satisfied that his conduct is the same in other cases, he is justified in saying so, if he conscientiously believes it. I beg leave to say, that I do not conceive that there is any thing in that part of the charge that I can lay hold of. And as to all of them, I may add, that they do not demonstrate malice; and the only mode in which malice is attempted to be made out is by their being reiterated on several occasions. If it so happens, (as is justly observed in the interlocutor), that he repeats the conduct which called for the censure, is it the fault of the Judge that he is bound in duty to repeat the censure? That infers no malice, and yet it seems it is on

that, and that alone, that the gravamen of charge of malice lies. Therefore I agree, that there is nothing on the face of the thing to indicate malice. But the allegation of malice is of no consequence, as there is no mode of proving it. I may only add, that I would not shrink from observing on the conduct of a person bringing a summons in such circumstances; but as he is now no more, I will not say any thing on it. I agree with your Lordships, that the interlocutor ought to be adhered to.

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The Court, therefore, on the 1st June 1821, adhered, and found his Lordship entitled to expenses.\*

The appellants then entered an appeal, and contended that the judgments were erroneous,—

1. Because the expressions directed against the conduct and character of Mr Haggart were highly injurious to him, and were calculated to destroy his professional reputation, and consequently were such as to entitle him to damages, unless they could be justified under the circumstances in which they were pronounced. But the only ground of justification was, that his Lordship had made use of those expressions in the bona fide exercise of his power and right, as a supreme Judge, to censure the conduct of a counsel conducting causes before the Court. This power, under proper limits, the appellants admitted; but they contended, that, in both instances libelled, its due limits had been so far exceeded as to warrant the inference that it had not been bona fide exercised, but had been used to gratify a feeling of irritation against Mr Haggart; that instead of being confined to the case before the Court, it had been extended to the whole professional life of Mr Haggart,—a latitude of censure which was inconsistent with the liberty and independence of the Bar, and highly unconstitutional and oppressive, (particularly as, in the first of the two instances libelled, Mr Haggart was denied all opportunity of defending himself); and that, unless the power of censure was placed under limitations, the reputation and fortunes of counsel would be left entirely at the discretion of any individual Judge who might entertain vindictive feelings, and be inclined to gratify them, by promulgating from the Bench unfounded and malicious charges.

2. Because, as it was libelled that the expressions had been made use of from motives of private malice, and as in judging of a question of relevancy this must be assumed to be true, the appellants were entitled to a proof, and at all events to lodge a

\* See 1. Shaw and Ballantine, No. 54. and Fac. Coll.

April 1, 1904. condescendence of their averments, according to the usual practice; but that, independently, the expressions themselves, and the mode and circumstances in which they were used, established the truth of the allegation. And,

3. That although Judges were protected in general against claims for what they may have done in the due exercise of their judicial functions, yet there was no authority which declared that they should be exempt from responsibility for the malicious abuse of their powers; and that all the statutes to which reference had been made merely established that they were to be liable to punishment by the King, but not that private individuals were not to be entitled to pecuniary redress.

On the other hand, it was maintained by his Lordship,—

1. That even if malice were substantially alleged, this would not support the action of the appellants. In support of this proposition he contended, that as the ground of the action was a judicial act done in his capacity of President of the Court of Session, in the presence of, and under the controul of the Court, as its organ and speaker, the question came to be, whether, upon a mere general allegation of malice, any party who has been in Court may raise an action of damages against any of the Judges, or the whole Court of Session, for an act done by them or by the Court? If this were competent, then, as Judges were onerous agents, and there was as little reason for distinguishing between malice and any other cause of wrong, actions might be instituted against them upon mere allegations of favour, fear, negligence, or incapacity. But if such actions were competent, then not only the individual Judges, but the whole Court of Session, and even the Court of Justiciary and Exchequer, might be convened before the Commissary, the Sheriff, or the Bailie Court, and their proceedings reviewed by these inferior tribunals;—a consequence so anomalous and so absurd that it demonstrated the incompetency of the action; and accordingly no precedent had been adduced in support of it, although there must have been frequent opportunities and inducements to try the question. On the contrary, there were numerous authorities, both in the law of Scotland and England, which established that a supreme Judge was not subject to any action, either before his own or any of the Inferior Courts, for what he had done in performing his judicial functions, and that he was only answerable to some extraordinary jurisdiction or power, as the King in Council, or Parliament. And,

2. That as it was not pretended that the appellants could

allege any other facts than those which they had libelled to establish malice, and as the malice was said to be matter of inference from the expressions which had been used, there was not such a substantial allegation of actual existing malice as ought to be admitted to proof, even supposing the action were competent. April 1. 1894.

The House of Lords, in each of the cases, 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed, with L. 200 costs.'

LORD GIFFORD.—My Lords, I consider this a cause of very great importance indeed, as it involves a question, Whether an action is to be maintained by a private individual against a Judge for words spoken in the exercise of his judicial duty, delivered from the Bench, in the face of judgment?

I look upon it as extremely fortunate that, in every part of his Majesty's dominions, all Judges, however high their rank and station, are responsible for their official conduct; and most lamentable and frightful would be the situation of the country if they were not; for, however great their elevation, Judges are still but men, and subject to all the errors and infirmities of human nature. But the question here is, not whether a Judge lies under a public responsibility for his judicial acts? but whether an action of damages is competent against the Judge, at the suit of any private party who may feel himself aggrieved by the judicial acts of that Judge?

My Lords,—If I had felt any doubt upon this point, I should have had great hesitation in coming to the conclusion at which I have arrived; but, after the utmost attention which I have bestowed upon the present case, I have no difficulty in giving it as my firm and decided opinion, that this action is not maintainable.

It has been admitted by the appellants, that this is the first attempt to bring such an action; and after the ability and industry so eminently displayed by their counsel, they have not been able to lay before your Lordships a single authority, either from statutes, from adjudged cases, from the opinions of text writers, or from the dictum of any Judge, to authorize such a proceeding. And, my Lords, so far is this state of things from being productive of any detriment to the due administration of justice, that, were the law otherwise, it would go at once to subvert the independency of Judges, and be found, upon very short experience, to operate most prejudicially upon the interests of the suitors themselves.

My Lords,—Much as it has been urged at your Lordships' Bar, I can discover no ground for the distinction endeavoured to be drawn, between language used by a Judge upon the Bench, and any other judicial act; for those who argue for the competency of such actions as those now brought before this House, must go the length of maintaining, that any judgment may be canvassed by an unsuccessful party,

April 1. 1824. for the purpose of grounding upon it an action of damages against the Judge.

It has been said, that such actions can only be prosecuted before the Court of Session. I can find no authority for such an opinion, or for holding that they are not equally competent before an inferior Court. If so, what must be the consequence? Of necessity the inferior Court must inquire into the proceedings which gave rise to the judicial act complained of, before they can decide upon the question of damages. It is admitted, that the Court may censure either a party or a practitioner of the law, for any irregularities appearing in the course of a suit; and thus the inferior Court would be entitled, and indeed called upon, to overhaul the whole proceedings of the Judge or Court complained of, in order that such an inferior Court may be enabled to determine whether the censure was merited or not. But this leads inevitably to the conclusion, that the inferior Court may reverse the decree of the superior—a conclusion sufficiently absurd to prove that the argument cannot possibly be sound.

I make no remark whatever upon the conduct of Mr Haggart, of whom I know nothing, and probably your Lordships know nothing. I shall, in my remarks which I have to make, abstain from any observation upon the particular expressions which called down the censure complained of, because these expressions have not been set forth in the printed cases, and because the person upon whom the censure was inflicted is dead. I may, however, observe, upon the first summons, (which is by far the most material), that it narrates various proceedings in which Mr Haggart, acting professionally as an advocate at the Scottish Bar, had been visited with animadversions from the Lord President; and particularly, in the year 1809, in the course of an action depending in the Court of Session, between his Grace the Duke of Athole and a gentleman of the name of Robertson. The summons then recites subsequent occurrences, in a suit between the same noble Duke and a Mr Leslie, in which the Lord President is said to have used the expressions which alone are made the grounds of this first action. Those which had occurred on the former occasion appeared to have been introduced for the purpose of proving malice on the part of the respondent. But, my Lords, if these appellants had sought reparation in an inferior Court, such Court must have gone into an investigation of all the proceedings referred to in the summons, (or declaration, as we should call it in the English Courts), whether stated as matter of substantive charge, or of aggravation.

My Lords,—The expressions ascribed to the Lord President, and which appear to have given the most offence to the deceased, are thus stated in the summons, which your Lordships will find printed on p. 4. of the appendix to the respondent's case. In the first, 'Mr Haggart has here, as is his usual practice, stated facts and circumstances, of which there is no evidence on the record, and which live in the memory and recollection of that gentleman alone. Mr Haggart has conducted

this cause, as he does all the others he is concerned in, differently from all the other counsel at the Bar.' And while it was admitted by the appellants, that although the Lord President was fully authorized to remark upon the advocate's mode of conducting the cause then under the immediate consideration of the Court, it was contended, that his Lordship was not justified in thus characterizing the whole course of Mr Haggart's professional practice.

But, my Lords, it is here most important to observe, that the Lord President is not even accused of having said any thing extrajudicially. The words attributed to the learned Judge were uttered in presence of all the other Judges, and in the hearing of the whole. His Lordship said from the Chair, 'I conversed with my brethren on this subject in the robing room, and the opinion I have delivered is that of the whole Court.' The reprimand from the Chair must, therefore, be considered and held to be the act of the whole Court; and if the other Judges entertained an opinion different from that of the Lord President, they should have said so.

My Lords,—Several Acts of the Parliament of Scotland have been cited in these papers, and by counsel at the Bar, in the course of their very able argument, to prove the responsibility of Judges; but after a careful examination of all these statutes, I am decidedly of opinion, that every one of them relates to a public responsibility, without affording the slightest countenance to a civil action of damages at the suit of a private party.

With regard to the second action brought under appeal, the language complained of is much weaker; and it appears that, in this instance, the Lord President was not the first person who had noticed exceptionable language in Mr Haggart's recorded pleadings. Indeed, it is admitted in the summons, that one of the Judges had previously observed upon certain passages in the paper drawn by that counsel, as being injurious to two persons, the one a lady and the other a gentleman.

It has been objected, my Lords, on the part of the appellants, that we are not to make any reference to the law of England, as this is purely a question of Scotch law. But, in the absence of all authority in the law of Scotland, that of the sister kingdom, as founded on good sense, and the most correct views of expediency, may be very correctly and usefully referred to; and no lawyer will assert, that any such actions, as those now before the House, could be entertained in the Courts of this country. Without a remedy so unheard-of, the independence of the English Bar has not suffered; nor has the want of such a remedy been injurious to the interests of suitors in our Courts.

My Lords,—To admit of such evidence of malice as has here been offered, (evidence to be derived merely from construction of the 'words themselves,') would be to make way for the utmost confusion and mischief in the administration of justice; and, upon the whole, the

April 1. 1824. conclusion is irresistible, that the interlocutors of the Court below are well founded.

In conclusion, my Lords, considering the nature of these actions, the long protracted litigation to which the learned Judge has been exposed, and that this is the first attempt to subject the conduct of any Judge to such a scrutiny at the suit of a private party, I am farther of opinion, that we would not do justice to the eminent character who has now been made to appear as respondent, if we did not order those interlocutors to be affirmed, with costs.

*Appellants' Authorities.*—Anderson, Jan. 3. 1750, (13,949.); 4. Stair, 1. 6.; 1537, ch. 36.; 1. Ersk. 3. 9.

*Respondent's Authorities.*—Instruct. to Commissaries, 1563, § 8.; Balfour, 637.; Spott. Pract. Preface; Comyn's Dig. Tit. Action on the Case for a Conspiracy, B.; 1. Hawkins, 72. 6.; 1. Robert I. ch. 31.; 1469, ch. 20.; 1487, ch. 12.; 1540, ch. 104.; 4. Stair, 1. 6. 24, 25, 26.; 6. Anne, ch. 6. § 1.

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

(Ap. Ca. No. 25.)

No. 20. JOHN INNES, R. B. ALLARDYCE, and Others, Appellants.—  
*Fullerton.*

Sir ALEXANDER KEITH, Respondent.—*Murray.*

April 6. 1824.

1ST DIVISION.  
Lord Succoth.

*Commonty.*—This was a question as to whether the Common or Forest of Cowie, situated in Kincardineshire, belonged to the respondent in property, subject to rights of servitude in favour of the appellants? or whether it belonged to them in common property? The decision of the case depended upon a series of complicated titles, and a long parole proof, on advising which, the Court, on report of the Lord Ordinary, found, 'that the whole of the forest, muir, and commonty of Cowie, belongs in property to Sir Alexander Keith of Dunottar, subject to the rights of servitude, and others, which the other heritors may be able to instruct over the same.' And to this interlocutor they adhered on the 3d of February 1818. The House of Lords ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.

J. DUTHIE—J. RICHARDSON,—Solicitors.

(Ap. Ca. No. 27.)

JAMES LINDSAY, and Others, Trustees of Mrs JANET CORBET, and No. 21.  
Mrs CHRISTIAN CORBET, Appellants.—*Shadwell—Murray.*

Mrs AGNES ANN KERR, and Others, Heirs of the late GEORGE  
BROWN KERR, Respondents.—*Abercromby—Walker.*

*Proof—Onus Probandi.*—A party having been served lawful heir of another; and a reduction of the service being brought; and it being alleged that he was proved to be habit and repute a bastard;—Question raised and discussed as to whether it was incumbent on the party averring bastardy to establish that fact, or whether the proof of being so by habit and repute, threw the burden of proving legitimacy on the other party.

JAMES CORBET of Kenmuir, near Glasgow, went to North America about 1745, where he had a daughter, Ann Corbet, by Agnes Martin; and the question in this case was, Whether she was a lawful daughter or not? She was sent to Scotland for the benefit of her education, and whither her father, James Corbet, returned about 1750. After the death of Agnes Martin, he was married, in 1771, to Janet Berry, by whom he had a son James, and two daughters, Janet and Christian. His daughter Ann went back to America in 1764, where she was married to Samuel Kerr, by whom she had a son, George Brown Kerr, and several daughters, who were the respondents.

April 6. 1824.

1ST DIVISION.  
Lord Hermand.

James Corbet having acquired considerable heritable property, took the titles to himself in liferent, 'and, after his decease, to James Corbet, his son, and the heirs whatsoever of his body, in fee; whom failing, to himself and his own nearest lawful heirs and assignees whomsoever.' In 1790 he made a will, written with his own hand, in which inter alia he bequeathed a legacy 'to Ann Corbet, my daughter, procreated between me and Agnes Martin, my first wife, and spouse of Samuel Kerr, merchant, late in Virginia, now in New-York.' He died in the course of that year, and was succeeded by his son James. In 1806 James died unmarried and intestate; and Ann Corbet being also dead, George Brown Kerr, her son, took out a brieve and obtained himself served 'one of the nearest and lawful heirs of provision to the said James Corbet, junior,' and thereupon obtained himself infeft in the lands. At the same time Janet and Christian Corbets, conceiving that they had the sole right to the property, took possession; and thereafter the appellants, as their trustees, brought a reduction of the service of George Brown Kerr, and of his titles, on the ground that James Corbet and



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Agnes Martin had never been married, and that consequently Ann Corbet, the mother of George Brown Kerr, was illegitimate. This being denied, and George Brown Kerr having died and been succeeded by the respondents, his sisters, and a proof having been taken, and there being no direct evidence of the marriage, and the parties having produced witnesses, some of whom deponed that Ann Corbet had always been reputed illegitimate, while others swore that she had been habit and repute a lawful child, the question was raised, on whom the onus probandi lay?

On the part of the appellants it was contended, that, in considering this question, the circumstance of a service having been obtained could not be taken into consideration at all; that if proof were brought that the party claiming to be heir was reputed a bastard, it was incumbent upon the claimant to prove that the parents were married, or at least that they were habit and repute married persons; and that as the appellants had established that Ann Corbet was reputed a bastard, the burden of proving the marriage of the parents, and consequent legitimacy of Ann Corbet, lay upon the respondents.

On the other hand, the respondents maintained, that although the verdict was not conclusive, yet it was *prima facie* evidence in their favour, and must bear faith until cause for setting it aside should be shewn: that when filiation was admitted (which in this case it was), legitimacy is presumed; and therefore it was incumbent on the party disputing that fact to redargue the presumption; and as the appellants were pursuers, the onus probandi lay upon them.

The Court, on the report of the Lord Ordinary, and on advising a voluminous proof, repelled the reasons of reduction, and assolized the defenders; and on the 31st of May 1821 they refused a petition, which was too late in being presented, as incompetent.\*

The appellants having entered an appeal, the House of Lords ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed, with L. 100 costs.

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\* See 1. Shaw and Ball. No. 47. It is stated in the respondents' case, p. 14. that their Lordships were clearly and unanimously of opinion, that, considering that it was the pursuers' business to prove their case, they had made out no case at all. It was held, that the weight of evidence preponderated so greatly in favour of the respondents, that this was not to be viewed even as a case of divided repute; but that, even holding it to be divided, by far the largest and most respectable mass of it was due to the respondents.

*Appellants' Authorities.*—3. Bank. 4. 29.; 3. Ersk. 8. 66.; 3. Stair, 5. 42, 43.; April 6. 1824. Erskine, Jan. 8. 1736, (No. 1. Elch. Service); Speeches in Douglas cause; Hunter, July 8. 1812, (F. C.); Mack. Ob. p. 114.; 4. Stair, 14. 11.; King's Adv. Feb. 19. 1669, (12,637.); Cunningham, Jan. 13. 1670, (12,637.); Geddes, Feb. 25. 1796, (12,641.)

*Respondents' Authorities.*—3. Stair, 3. 42.; 1. Bank. 1. 62.

SPOTTISWOODE and ROBERTSON—J. RICHARDSON,—Solicitors.

(Ap. Ca. No. 28.)

Mrs ELIZABETH STEWART or RICHARDSON, Appellant.—  
*Keay—Murray.*

No. 22.

Mrs CHRISTIAN STEWART or HAY, and Mrs CHARLOTTE STEWART or ALSTON, Respondents.—*Walker—Tait.*

*Service—Clause—Marriage-Contract.*—A party having, by an antenuptial contract of marriage, disposed his estate to the heir-male of the marriage, 'and to the heirs and assignees whatsoever of the said heir-male, in fee;' whom failing, the heir-male of any subsequent marriage, and the heirs of his body; whom failing, to the heir-female, or eldest daughter of the marriage, and who should always succeed without division; and a son of the marriage having existed, but died without issue, leaving three sisters;—Held, (affirming the decision of the Court of Session), That the three sisters had right to the estate, as heirs-portioners of their brother, and not the eldest without division.

ON the 10th of February 1766, James Stewart of Urrard, in the county of Perth, on his marriage with Miss Elizabeth Robertson of Tullybelton, entered into a marriage-contract, whereby he provided and disposed 'to and in favours of himself and the said Elizabeth Robertson, his promised spouse, and the longest liver of them two, in conjunct fee and liferent, with the said Elizabeth Robertson, in case she survive him, her liferent use and possession, during all the days of her lifetime, of an annuity of L.1000 Scots money, free of all public burdens, to be paid to her yearly, out of the first, best, and readiest of the rents, maills, and duties of the lands and others underwritten, in manner and at the terms after-mentioned; and the said whole lands and others underwritten, to the heirs-male to be procreate betwixt the said James Stewart and Elizabeth Robertson, of this intended marriage, and to the heirs and assignees whatsoever of the said heir-male

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2D DIVISION.

April 8. 1824. ' in fee; whom failing, to the heir-male or son to be procreate of  
 ' the body of the said James Stewart of any subsequent marriage,  
 ' and the heirs of his body; whom failing, or if the said heir-male  
 ' to be procreate of the body of the said James Stewart of a subse-  
 ' quent marriage shall exist and afterwards fail by death before he  
 ' is either married or attains to the age of twenty-one years com-  
 ' plete, to the heir-female or eldest daughter to be procreated of  
 ' this intended marriage betwixt the said James Stewart and Eli-  
 ' zabeth Robertson, and the heirs of her body, without division;  
 ' whom failing, to the next eldest daughter of the said intended  
 ' marriage, and the heirs of her body, and so on successively while  
 ' any daughter of the intended marriage exists; the eldest daughter  
 ' existing always to succeed without division, as said is; whom  
 ' failing, to the said James Stewart, his own other nearest heirs  
 ' or assignees whatsoever, heritably and irredeemably, and the  
 ' said daughters or heirs-female who succeed to the said estate  
 ' always marrying a gentleman of the surname of Stewart, or one  
 ' who shall assume and bear that surname.' In a subsequent  
 part of the deed it was provided, that ' if a son of this mar-  
 ' riage succeeds to the estate, the said James Stewart does hereby  
 ' secure and provide to the younger children of this marriage  
 ' the portions after-mentioned: viz. If there happens to be one  
 ' younger son or daughter only, he provides him or her in the  
 ' sum of 12,000 merks Scots; if two younger sons or daughters,  
 ' in the sum of 15,000 merks money foresaid; and if three or  
 ' more sons or daughters, in the sum of 18,000 merks Scots;  
 ' and in case an heir-female or daughter of this marriage succeeds  
 ' to the said estate, the younger daughters of the marriage are  
 ' hereby provided and secured to the same portions as are last  
 ' above-mentioned, in the case of a son of the marriage succeed-  
 ' ing: That is, if there is but one younger daughter, she is to  
 ' have 12,000 merks Scots of portion; if two younger daughters,  
 ' 15,000 merks money foresaid; and if three or more younger  
 ' daughters, 18,000 merks Scots; and if there are two or more  
 ' of the said younger children, their foresaid portions are to be  
 ' divided amongst them by the said James Stewart, as he shall  
 ' think proper: and failing of such division, the same to belong  
 ' to them equally; and the said portions are hereby declared  
 ' to the said younger children, in full satisfaction to them of all  
 ' they can ask, claim, or crave of the heir succeeding to the estate,  
 ' excepting the father's good-will allenarly; and their aforesaid por-  
 ' tions are to be paid to them as follows: viz. The just and equal

‘ half thereof, as the said younger children respectively happen  
 ‘ to be married, or attain to the age of eighteen years; and the  
 ‘ other just and equal half thereof, at the death of the said  
 ‘ Elizabeth Robertson, their mother; the said younger children  
 ‘ being always alimanted and educated at the expense of the  
 ‘ heir who shall succeed to the estate, from and after the father’s  
 ‘ death till the first half of their portions falls due to them res-  
 ‘ pectively, with annualrent after the several terms of payment,  
 ‘ during the not-payment: But failing of a son or heir-male  
 ‘ of this marriage, or if a son or heir-male to be procreated  
 ‘ of the body of the said James Stewart, of a subsequent mar-  
 ‘ riage, shall succeed to the aforesaid estate, in that case the  
 ‘ said James Stewart doth hereby provide, and bind and oblige  
 ‘ himself, and his said heir, and other representatives succeeding  
 ‘ to him in his estate real and personal, to satisfy and pay to the  
 ‘ said daughter or daughters of this marriage, in full of all they can  
 ‘ claim of the said heir-male of a subsequent marriage, the por-  
 ‘ tions and sums of money after-mentioned: viz. If there is but  
 ‘ only one daughter of this marriage, the sum of 12,000 merks  
 ‘ Scots money; if two daughters,’ &c.

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Of this marriage there were four sons and four daughters. Mr Stewart died in 1781, and was survived by his wife; so that the contemplated event of a second marriage did not occur. He was succeeded by his eldest son John, who, from his infancy, was in a state of mental imbecility: His younger brothers, and one of his sisters, predeceased him, without issue, and he died also without issue, in September 1818. On this event, a competition arose between his three surviving sisters for the estate;—the eldest, Mrs Elizabeth Stewart, wife of James Richardson, Esq. of Pitfour, contending that she was entitled to succeed, under the destination of the contract of marriage, without division; while her two younger sisters, Mrs Christian, wife of James Hay, Esq. of Seggieden, and Mrs Charlotte, wife of James Alston, Esq. maintained, that they were entitled, as heirs of their brother, to succeed along with her, in the character of heirs-portioners. Each of the parties having taken out briefs to be served in the characters claimed by them, and the question having been discussed before the Macers, where Lords Pitmilley and Cringletie officiated as assessors, it was reported to the Second Division, on informations.

On the part of the two younger sisters it was contended,—

1. That as the lands were destined ‘ to the heirs-male to be  
 ‘ procreated betwixt the said James Stewart and Elizabeth Ro-

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‘bertson of this intended marriage, and to the heirs and assignees ‘*whatsoever*’ of the said heir-male, in fee;’ and as that heir-male had existed, his heirs whatsoever were entitled to succeed to the estate; and as the two youngest sisters, together with the eldest, were his heirs whatsoever, they had right to the estate as heirs-portioners: That besides, as the estate was provided to the heir-male of the marriage, and his ‘heirs and assignees ‘*whatsoever*,’ whom failing, the other parties mentioned in the deed, these other parties were merely conditional institutees, who could only take in the event of there having been no heir-male of the marriage; for if there was such an heir-male, then the condition was purified, whereby they were deprived of the benefit of the conditional institution; and as the conveyance was taken to the heirs whatsoever of the heir-male, and every existing person must have heirs whatsoever, it was clear that the condition which must be held to have been contemplated was that of existence of the heir-male, and not of his failure by death without heirs of his body; and therefore the right of the parties so instituted had come to an end. And,

2. That although the term ‘heirs whatsoever’ had a certain extent of flexibility, so as to point out different heirs under different circumstances, (as, for example, the heir of conquest or heirs-portioners), yet they had not an universal flexibility: that although it was true that the intention of a party was to be given effect to, yet the rule of law was, that that intention was to be explained according to the technical interpretation of the words which he had used, unless there was complete demonstrative evidence that he had made use of them in a sense different from that fixed upon them by law; but that in the present case there was no such evidence, and, on the contrary, it rather appeared that it had been the intention of the contracting parties, that, in the event of the existence of an heir-male, the estate should vest in him and his heirs whatsoever, in preference to the heirs of any other marriage, or the other substitutes.

On the other hand, it was maintained by the eldest sister,—

1. That as this was an unfettered destination, there could be no doubt that the heir-male of the marriage, who existed, and made up titles, had power to dispose of the estate at his own pleasure; but that it was equally clear, that if he executed no deed, disposing of the estate otherwise, the destination of the contract must receive full effect, according to its terms, though still as a simple and unfettered substitution: that it was evidently a destination containing various substitutions of heirs, called

one after another by the proper terms 'whom failing,' &c.; and that there was not a word in the deed from which the inference could be drawn, that any part of the destination was less a substitution than any other: That the idea of that part of the destination which follows the provision in favour of the heir-male of the marriage, and his heirs or assignees whatsoever, being a conditional institution, and dependent on the event of no heir-male of the marriage existing, was a gratuitous assumption; and contrary to the express terms of substitution employed: That as this was a question of intention in a simple destination, it must be determined by a due consideration, not of one clause only, but of the whole clauses together. But the term 'heirs whatsoever' was of a general and flexible nature, capable of being explained or limited in its legal effect by other provisions and declarations of intention in the same deed, as had been found in the case of *Roxburghe*; and that in the present case it was plain, from the other clauses, that the intention of the contracting parties was, that if the heir-male died without heirs of his body, then the estate should descend to the heir-male of any subsequent marriage, and the heirs of his body, whom failing, to the eldest daughter without division; and that as such was the manifest intention of the parties, the words 'heirs whatsoever' must be construed accordingly; and consequently the estate now opened in favour of the eldest daughter. And,

2. That supposing the above proposition were not well founded, still there was an express clause in the deed, providing that the eldest daughter was 'always to succeed without division.'

The Court, after a hearing in presence, 'remitted to the Macers, with instructions to proceed in the service of the three sisters of John Stewart as heirs-portioners and of provision to the estate of Urrard;' and to this interlocutor they adhered on the 5th of July 1821.\*

\* See 1. Shaw and Ball. No. 131. and Fac. Coll. where it is said, that 'the Judges were not unanimous.' *Lord Glenles* held, that the proper signification of the terms 'heirs whatsoever' was controlled by the subsequent branches of the destination, and the clause of provisions to the younger children, since there seemed a manifest absurdity in supposing a distinction intended to be made, in reference to the order of succession of the postponed heirs, between the case of the existence and non-existence of an heir-male of the intended marriage. But the *Lords Justice-Clerk, Bannatyne, and Craigie*, without feeling it necessary for the decision of the cause to determine the question whether the daughters of the marriage were specially called as substitutes or conditional institutives, concurred in opinion that the contract, viewed in all its parts, did not entitle the Court to ascribe an intention to the parties which is contradicted by the technical acceptance of the leading and most material branch of the destination.'

April 8. 1824. The eldest sister having appealed, the House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.'

**LORD GIFFORD.**—In the case in which Mrs Elizabeth Stewart, wife of James Richardson, Esq. of Pitfour, and the said James Richardson, are appellants, and Mrs Elizabeth Craigie Stewart, wife of James Hay, Esq. and Mrs Stewart, wife of James Alston, Esq. and the said James Hay and James Alston, for their interests, are respondents, which was heard at your Lordships' Bar in the course of the last week, I wish, before making any motion to your Lordships as to the decision to which your Lordships should arrive in this case, to state to your Lordships what has occurred to me in this, which is undoubtedly a case of very considerable importance in the law of Scotland.

My Lords,—It appears that the appellant took out a brievé, claiming to be served the only heir of provision under the marriage-contract of her father. The respondents upon this took out a brievé for a general service as heirs-portioners, and, as such, heirs of provision under that contract. This case coming on in the Macers' Court, the parties were heard by their counsel, and the debate in the competition was ordered to be stated in informations, to be reported to the Second Division of the Court of Session. The case was accordingly so stated, and on its coming on before that Division, the Lords of the Second Division, on the 13th May 1820, pronounced this interlocutor :—'The Lords having advised the mutual informations for the parties, with the contract of marriage referred to, remit to the Macers, with instructions to proceed in the service of the three sisters of John Stewart as heirs-portioners and of provision to the estate of Urrard.' By that decision, Mrs Christian Craigie Stewart, and Mrs Charlotte Stewart, were held entitled to be served as heirs (conjunctly with the appellant) of John Stewart, as heirs-portioners and of provision under the marriage-contract. Against this interlocutor the appellant presented a reclaiming petition, which was answered by the respondents; and on that the Lords of Session pronounced a second interlocutor, adhering to the decision which had been pronounced.

The question in this case arises on the construction of the marriage-contract entered into by Mr James Stewart of Urrard, in the county of Perth, with a lady of the name of Elizabeth Robertson, dated on the 10th February 1769; and I will shortly state to your Lordships the terms of that contract in contemplation of marriage on which the question arises. (His Lordship then read the clause. See p. 149.)

In a further part of this deed provision is made for an obligation to infest, and a procuratory of resignation in certain events. Then it proceeds, 'Likeas if a son,' &c. See p. 150.

After the execution of this contract, the terms of which I have stated to your Lordships, this marriage took effect, and Mr Stewart the

father died in the year 1781; his wife, Elizabeth Robertson, survived him, and of course there was no second marriage. The issue of this marriage by Elizabeth Robertson consisted of four sons and four daughters. The three younger sons died many years ago, and left no issue; the eldest son, John Stewart, survived all his younger brothers, and died in September 1818 unmarried. By his death, therefore, the male issue of James Stewart and Elizabeth Robertson became extinct; and as James Stewart, the father, was survived by his wife, there could be no heir-male of a subsequent marriage. The appellant Mrs Elizabeth Stewart, wife of Mr James Richardson, is the eldest daughter of the marriage; and the respondents in this appeal are the other children.

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The question arises on the construction to be applied to the destinations, as they are called, in this instrument. It is admitted on all hands, that, *prima facie*, and according to the technical meaning of the terms used in the first destination of this marriage-contract, the respondents are entitled, because the words 'heirs and assignees,' or 'heirs whatsoever,' describe the heirs of line, which character these ladies, in conjunction with the appellant, take; but then it has been contended, that although this is, *prima facie*, the technical meaning of this destination, that meaning may be restricted by the context, or other parts of this instrument, if it can be clearly shewn that this party intended to use those terms in a more restricted and limited sense; and undoubtedly, my Lords, I apprehend that is a correct statement of the law of Scotland with respect to the construction of instruments; and in this sense it is that the word 'heirs' or the words 'heirs-male,' are terms which in this case, and in other cases, have been by your Lordships treated as flexible terms;—that is, that they have a meaning which is to be applied to them, provided there is nothing in the case to shew that they were meant in a restricted sense; but if so, then, although such be their general meaning, they must be limited and restrained, and therefore the terms used in this case, and in others, have been considered to be flexible. It is also admitted by the learned persons, all of whom pronounced opinions upon this case in the Court below, that although such be the law, you are undoubtedly not to restrain the meaning of terms of this nature by mere conjecture, or upon a notion that, without restraining them, you cannot carry that into effect which you may conjecture would have been the meaning of the party, if he could have foreseen the events which have happened, —the events which raise the question as to the construction of this instrument. And, my Lords, I cannot, I think, state to your Lordships so applicably, or more applicably, what the law of Scotland is, as decided in their Courts, but still more as decided by your Lordships, than by referring your Lordships to what is stated by a noble and learned Lord, the present Lord Chancellor, in the great Roxburghe case, in a most luminous judgment pronounced by him upon that occasion. My Lords, he states the result of the law as laid down in



April 8. 1824. a case which has been referred to; I mean the case known by the name of the Linplum case. He states, that the result of that decision was, (which he considered to be most accurate in all its parts), 'that in construing a deed, on which there is a question as to the true intent of the author of that deed, you are to adhere to that as the intent which is the prima facie obvious meaning of these words; unless you are, by fair reasoning, by strong argument, by that which amounts to necessary implication or declaration plain, driven out of the obvious meaning; and unless you can satisfy yourself that the author of the deed did not intend that such should be taken to be the meaning of the words he had used; and unless you collect (I think I may safely add that, and abstain from going further) that that is not the meaning of the language of the author of the deed, from what the author of that deed has himself, by the deed, told you is the meaning of his language.' And, my Lords, undoubtedly, in considering this case, it is my duty, and my anxious desire, to adhere to that criterion in the construction of this instrument.

Now, my Lords, that being the law, I will once more call your Lordships' attention to the language of this instrument. The first destination is 'to the heirs-male to be procreate betwixt Mr Stewart and his wife, and to the heirs and assignees whatsoever of the said heir-male in fee.' If it had stopped here, there would have been no question; because undoubtedly the result of that destination would be, that the eldest son of that marriage, John Stewart, would take; and he dying, the estate would descend to those persons who were heirs of line of that gentleman under the destination. The deed then goes on, 'whom failing,'—and, my Lords, I shall, in the course of the observations I shall address to your Lordships, have something to observe on the meaning of those words,—'whom failing, to the heir-male or son to be procreate of the body of the said James Stewart of any subsequent marriage, and the heirs of his body;' so that in this destination he no longer mentions the 'heirs and assignees whatsoever,' which had occurred in the first destination, but he here confines the destination to the heir-male or son of the second marriage, and the heirs of his body, 'whom failing, or if the said heir-male to be procreate of the body of the said James Stewart of a subsequent marriage shall exist, and afterwards fail by death before he is either married or attains to the age of 21 years complete, to the heir-female or eldest daughter to be procreate of the intended marriage, and the heirs of her body,'—here again he uses the words 'heirs of the body,'—'without division; whom failing, to the next eldest daughter of the intended marriage, and the heirs of her body; and so on successively while any daughter of the intended marriages exists.'

I stop here for a moment—not that it is very material in the consideration of the present question—to remark to your Lordships, that undoubtedly the word 'marriages' occurs in the plural number. I cannot help thinking, however, that this is a slip, that the letter s got

in there by mistake; for I find in the procuratory of resignation to this deed the word 'marriage' is in the singular number, and one can hardly suppose that, in talking of a second marriage, he would talk of it in this instrument as an intended marriage; the intended marriage was that about to take place with Mrs Robertson; but undoubtedly the word is marriages. I observe in the provisions for younger children there is no provisions for the daughters of the second marriage; all the provisions are for the daughters of the first marriage. Then he says, 'whom failing, to the said James Stewart, his own nearest heirs or assignees whomsoever.' Now, here again you have the expression 'heirs and assignees whatsoever,' which occur in the first part of this destination. I remark upon this, because I think it shews that the framer of this deed, (and we must consider Mr Stewart, the party entering into this contract, to be acquainted with the terms he uses), was aware of the distinction between heirs and assignees whatsoever, and heirs of his body. But in order to get at the construction which the appellant contends for, you must construe the words 'heirs and assignees whatsoever,' in the first destination, to mean heirs of the body; because undoubtedly, unless they can be so restricted, the appellant cannot succeed in this appeal.

Now, my Lords, I say, when the party has used two distinct sets of terms, one as applied to one set of individuals, and another occurring in almost the next succeeding sentence, as they do in this instrument, it requires, I think, very strong expressions in other parts of the instrument to satisfy any Court, that when he used two distinct expressions, he meant one and the same set of persons; that when he used the words in the first part, 'to the heirs-male' of that marriage, and to the heirs and assignees whatsoever of the said heirs-male in fee,' he meant heirs of his body, though in the very next destination, when he is contemplating the possibility of a son of a second marriage, he applies different terms, namely, 'heirs of the body;' shewing in that case he did not mean that heirs-male or heirs of line of that marriage should succeed, but only the issue or heirs of his body.

My Lords,—I find nothing decisive in the other parts of this instrument, though undoubtedly a great deal of ingenuity has been used, yet it does not appear to me, on an attentive consideration of these provisions, that they at all shew that which has been insisted for. If I were to conjecture, I might perhaps say, if this gentleman had been asked, in the event which has happened, do you mean that this estate should go to all your daughters, or only to your eldest daughter? perhaps I might have had a difficulty in making up my mind what would have been his intention, if he could have foreseen the event, but we can only collect his intention from the terms he has used. Now he undoubtedly contemplates, first, that a son may come into being of the first marriage, who may succeed to this estate; in that case he makes portions for his younger children. He then contemplates that,

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April 8. 1824. in the event which he has looked to in the previous provisions, it may happen, that an eldest daughter may succeed to this estate alone, as undoubtedly she might, and then he appropriates provisions for the younger daughters; and he looks forward to the events which undoubtedly, in point of order, occur first in the provisions for the younger children,—he contemplates the event of there being no son of the first marriage, or, in the construction put upon it, that, if there were a son, the heirs of the body of that son might subsequently fail, and the son of a second marriage might succeed to the estate; and in that event he has provided portions for the daughters of the first marriage: and it is argued, that it must have been the intention of the framer of this deed, that if there had been a son of the first marriage, and he failed, this estate should go to the eldest daughter, and the younger daughters should be provided for. If I were to speculate what this gentleman intended, if he had foreseen the event, it is difficult to say whether that might not have been his intention; but the question is, whether your Lordships can collect from this instrument such an intention, and that he meant to confine the words to the heirs of the body of the first son; for unless you can do so, it is impossible to arrive at the construction the appellant contends for. But more than that, there follows the words ‘whom failing, to the heirs-male of the said James Stewart of any subsequent marriage, and the heirs of his body;’ and it is contended, that the words ‘whom failing’ may apply to two events, namely, the non-existence of a son of the first marriage, or his existence and afterwards failure by death. Undoubtedly, my Lords, those words do apply to both those events; but then we should apply the rule of construction to those words which the appellant seeks to have applied to ‘heirs and assignees whatsoever,’ and see what he meant by the words ‘whom failing.’ Now, my Lords, in the very next sentence you will see, I think, that he meant by the words ‘whom failing,’ not both those events, but only the non-existence of a son of the first marriage. I will state, my Lords, the words:—He says, ‘whom failing, to the heir-male or son to be procreate of the body of the said James Stewart of any subsequent marriage, and the heirs of his body; whom failing,—here you have the same words again, but followed by these remarkable words, ‘or if the said heir-male or son to be procreate of the body of the said James Stewart of a subsequent marriage shall exist, and afterwards fail by death before he is either married or attains to the age of twenty-one years complete, to the heir-female or eldest daughter to be procreated of this intended marriage between the said James Stewart and Elizabeth Robertson, and the heirs of her body.’ It therefore appears to me tolerably clear, by this expression, that the words ‘whom failing,’ in the contemplation of the framer of this deed, meant entirely non-existing; because if they had applied to the second event, why does he go on to say, or if the heir-male shall exist, and afterwards fail by death before a certain event? and I observe one of

the learned Judges in the Court below, I think very justly, remarks upon this in the view I have taken the liberty of remarking to your Lordships; as shewing that the words 'whom failing' applied only to the case of a son of the first marriage not existing. April 6. 1824

My Lords,—If I am right in this view of the case, I say there is nothing in this instrument from whence you can collect, in the language of my Lord Chancellor in the Roxburghe case, that the author of the deed did not intend that that which is the *prima facie* and obvious meaning of this term should not be applied to it in the event that has happened. A son of that marriage came into existence; he lived (unfortunately in a state of mental incapacity) and then died; and the question is, whether these ladies have not the right to say under this instrument, that, having existed, and having therefore become entitled to this property under this destination, the father being dead, they have now a right as heirs-portioners of that gentleman, in conjunction with the appellant, to claim possession of the estate? and your Lordships will see that there is this inconsistency arising from this construction contended for on the part of the appellant,—the portions are provided for the daughters of the first marriage in case of a son coming into existence and succeeding to the estate; these ladies are clearly entitled in such case to those portions: there is also a provision, that if the eldest daughter shall come into possession of the estate, the younger daughters shall have portions. The construction, therefore, put upon this deed on the part of the appellant is this, that these ladies would be entitled to portions in consequence of the first event contemplated, and would also be entitled to other portions if the appellant succeeded to the estate, which, as it appears to me, is inconsistent with the intention of Mr Stewart the author of this deed. He contemplated an event, by which the estate would belong to one of his children, namely, the eldest son of the first marriage, and in that case he provided portions for the daughters; and I think it is clear that, in this case, the daughters would not succeed to the estate under the destinations of this deed, but would be entitled to the portions; whereas, if the construction contended for on the part of the appellant be a true one, they would be, as I have stated to your Lordships, entitled to two portions.

Then it is said, that he clearly meant to prefer the son of a second marriage to the daughter of the first, and that that intention would be frustrated by the construction sought to be put on the part of the respondents. My Lords, there was a little difficulty in that mode of arguing; for I observe in the papers in the Court below, (nor have they entirely abandoned it in the appeal case before your Lordships), that the construction sought to be put upon these words 'heirs whatsoever' is, that they were not quite so extensive as had been contended for. It is said, he evidently meant to prefer the male line; but your Lordships will see, that the destination to the eldest son and heir-male of the second marriage, is to the heirs of his body,

April 8. 1824. undoubtedly to daughters as well as sons; and therefore the daughters of that son would come in preferably to the daughters of the first marriage. Therefore it appears to me difficult to reconcile the construction of this instrument, in the way sought by the appellants, with all those events which might (supposing they had happened) have carried it away from the family of the first marriage; for undoubtedly, under this destination to a son of the second marriage and the heirs of his body, they would have taken before the daughter of the first marriage. It appears to me we are therefore driven into such a wide field of conjecture, that, so far from furthering the intention of the settler, we should more probably frustrate his intentions;—that we should be applying his words to events which he did not contemplate, and which we consider him as contemplating, unless, indeed, we conceive those words were intended to meet every possible contingency.

But then it is said, if the words 'heirs and assignees whatsoever' cannot be construed in the way contended for, still, as in this clause of the instrument, the eldest daughter existing is always to take without division; and as a case has occurred in which those daughters are claiming the estate, the eldest daughter must, by virtue of that provision, take the estate alone, and not with her sisters. My Lords, the succession to the estate must be in the lines which have been provided. If she had succeeded through those lines, then you would have the case for which she contends; but those words apply only to a succession of the daughters under this instrument. Now, here they claim as heirs of provision under this marriage settlement; but how do they claim? in the character of heirs whatsoever of their brother, and in the character as heirs of provision under the marriage settlement; but they do not claim it, if I may use the expression, under the original provision to daughters under the settlement, but as heirs-at-law to the son, and, as such heirs-at-law of the son, now entitled to the estate.

My Lords,—Such are the views I have taken of this case; but I cannot conclude these observations without adverting to topics which have been very forcibly urged at your Lordships' Bar in this case, as well as in others, namely, the danger to the law of Scotland from a decision such as I ask your Lordships to pronounce. In this case the decision of the Court below, proceeding upon the principle I have stated to your Lordships, and professing to adhere most strictly to the law as laid down in the judgment of this House, but expounded at large by the Lord Chancellor in his able and most elaborate judgment in the Roxburghe case;—I say, professing to be guided by those principles, the Court below have decided, that the obvious and technical construction of those words in this case must prevail; because they are unable to discover from the rest of the instrument that it was the intention of the author of the deed, in the events which have happened, to restrict the meaning of those terms: and I observe one of the learned Judges has stated the principle in the same way. It only shews how difficult it is for different minds to apply the same principle to

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the same case; for although he states it even more broadly than the Lord Chancellor, that it must appear as clear as the sun upon the whole of the instrument, that the meaning of the author of the deed was that which is contended for by the appellant; yet he thinks that, looking to the whole of this contract, that clearness does appear. The other learned Judges, taking the view of the case which I have, but professing to adhere, as I trust your Lordships will in this and in every case, to former decisions of this House, have come to a different conclusion. But your Lordships are told at your Bar, that to decide according to the judgment of the Court below, will be to introduce obscurity into the law of Scotland, and to throw doubts upon those principles which have been considered as established by the *Linplum* case, and previous cases. My Lords, I have heard, in the course of my experience in other cases, your Lordships called upon to affirm the judgments of the Court below, and that if your Lordships did not affirm them, you would throw the whole law of Scotland into confusion. Here, my Lords, it is represented, that there would be great danger of introducing obscurity into the law of Scotland by affirming the judgment of the Court below. My Lords, as an individual of your Lordships' House undoubtedly I should regret as much as any man that any doubt should be thrown upon the principles which have already been established in the law of Scotland, and particularly by your Lordships' decisions. Nothing can be more dangerous, and nothing undoubtedly is farther from my object on the present occasion; because undoubtedly my object in this, as I trust in every case in which I shall have the honour of humbly assisting your Lordships in any way, is not only to adhere to former decisions of your Lordships' House, but to enable your Lordships, as far as my abilities will enable me to assist your Lordships, to decide those cases upon principles of Scottish law, divesting myself of the prejudices arising from an education in an English court of justice, and confining myself to the principles to be extracted from the decisions of the Courts of Scotland on subjects of that nature. I trust therefore, my Lords, that nothing which has fallen from me in the course of the observations I have had the honour to make, will throw the least doubt upon the law of Scotland. I take that law to have been most ably expounded by the Lord Chancellor in the *Roxburgh* case; and it is with that view I have abstained from going through the cases which have been cited at your Lordships' Bar, the most luminous view of those cases having been taken of them in that case, to which I have frequently had occasion to refer your Lordships in the course of the observations I have made.

My Lords,—Adhering to those principles, applying them to this undoubtedly imperfectly and ill-drawn instrument, yet anxiously applying those principles to this case, I, for one, have not been able to discover in the whole of this instrument sufficient to entitle me to say that there is that 'declaration plain,' that necessary implication, to shew that the author of this deed meant by these terms, 'heirs and assign-

April 8. 1834. 'nees whatsoever,' any thing different from what is their obvious and technical meaning. When I find him using expressions in a more limited sense, following almost immediately in that destination; when I find him repeating those terms in the final part of this destination; I cannot, for one, understand him to mean, by 'heirs and assignees 'whatsomever,' that which he has expressed in another part of the instrument by 'heirs of the body.' When I find those different expressions used, and that undoubtedly the persona prædilecta was the heir-male of the body; when I find nothing inconsistent with that construction, though any one reading this instrument cannot but see there were events not contemplated by him; I cannot, for one, say what he would have said if he had been asked, If you have a son of the first marriage, and he dies without issue, do you mean that all the daughters should come in without distinction, or one should take without division?—when I cannot find that solved by the declaration of the parties, it appears to me it is the safest course to adhere to the natural construction of those words; by adhering to which construction I am adhering also to the principles on which all these cases must have been decided. I say, my Lords, therefore, for one, if your Lordships should concur with me upon that principle, this judgment must be affirmed; and if your Lordships should be of that opinion, I should humbly move you that this judgment be affirmed.

*Appellant's Authorities.*—2. Mack. p. 325.; Kilk. 468.; 3. Ersk. 8. 48. and 35.; Kilk. 190.; Buchanan's Trustee, March 4. 1813, (F. C.); Harvie, Dec. 12. 1811, (F. C.); Begg, Jan. 14. 1863, (4251.); Gordon, Feb. 19. and March 4. 1885, (14,849.); Schaw, Nov. 10. 1687, (14,850.); Laws, Jan. 19. 1697, (14,850.); Dickson, Feb. 23. 1697, (14,851.); Stephenson, June 24. 1784, (14,872.); Lord Eldon in Roxburghe cause; M. of Clydesdale, Dec. 16. 1725, (1262.); Kerr, June 23. 1807, (F. C.); Tinnoch, Nov. 28. 1817, (F. C.)

*Respondent's Authorities.*—3. Mantica, 4.; Baillie, March 26. 1770, (F. C.); Campbell, Nov. 28. 1770, (14,949.); Hay, July 24. 1788, (2315.); Sutties, Jan. 15. 1809, (F. C.); 2. Dict. 369.; Ballantyne, 1687, (3002.)

J. CHALMER—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 29.*)

No. 23. JAMES B. FRASER, Esq. Appellant.—*Shadwell—Murray.*

J. JORDAN WILSON, Esq. Respondent.—*Walker—Matheson.*

*Real Burden—Pointing of the Ground—Ameliorations.*—Held, (affirming the judgment of the Court of Session), 1. That it is competent to constitute a real burden on lands by a resignation ad remanentiam, effectual against a singular successor; 2. That the creditor in such real burden is entitled to pursue a pointing of the ground; and,

3. That he is entitled to sell the lands without accounting for ameliorations made by the singular successor. April 15. 1824.

IN 1809, Thomas Douglas, who was infeft on a crown charter in the lands of Blackburn, near Edinburgh, sold part of them to the respondent, James Jordan Wilson, for L.10,600, which was immediately paid. On the disposition which Douglas granted the respondent was immediately base infeft,—the superiority thereby remaining vested in Douglas. Soon thereafter the respondent, being dissatisfied with his purchase, entered into a transaction with Douglas, by which he agreed to reconvey the lands to him at the price of L.11,000, which sum was to be constituted a real burden on them, and for which Douglas, and two cautioners, George Lyell and Robert Dick, were to grant their personal bond, payable by instalments in ten years. In carrying this reconveyance into effect, Mr Ross, the late Dean of Faculty, recommended, that as Douglas was still vested in the superiority, the respondent should grant to him a disposition, containing a procuratory of resignation ad remanentiam, burdened with the price, and that upon that procuratory Douglas should complete his titles. The respondent, accordingly, on the 3d of November 1819, redispensed the lands to Mr Douglas,—

‘ Declaring always, as it is hereby expressly provided and declared, that the lands, teinds, and others before described, are hereby disposed under the express burden of the aforesaid sum of L.11,000 sterling, interest thereof from the term of Martinmas 1809, and a fifth part more of liquidate penalty in case of failure, contained in the said bond granted by the said Thomas Douglas, George Lyell, and Robert Dick, to me, and payable by the instalments and at the terms therein mentioned: And which sum of L.11,000 sterling, interest and penalty as aforesaid, is hereby declared a real lien and burden affecting the aforesaid lands, teinds, and others, and appointed to be engrossed in the infeftment or resignation to follow hereon, and in all future transmissions and investitures of the said lands, teinds, and others, aye and until the said sums be completely paid up in terms of the said bond. Declaring always, as it is hereby expressly provided and declared, that in the event of any part of the interest to fall due on the foresaid sums, or any part thereof, remaining unpaid after the term or terms of payment thereof respectively, it shall not only be competent to and in the power of me, the said James Jordan Wilson, and my aforesaid, to do personal diligence for recovery thereof, in virtue of the bond

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' granted as aforesaid; but also, notwithstanding of the assigna-  
 ' tion to the rents, mails, and duties hereinafter inserted, it shall  
 ' be competent to and in the power of me and my aforesaid to  
 ' enter to immediate possession of the lands and others before  
 ' described, and to uplift, discharge, or assign the rents and  
 ' duties thereof, or to attach the crop and stocking upon the said  
 ' lands for payment of the said interest; and in such case, I and  
 ' my foresaid shall noways be liable for the insolvency of tenants,  
 ' or the not doing of exact diligence, but only for our actual in-  
 ' tromissions, as the same may be ascertained by our writ or oath,  
 ' or those of our factor, attorney, or commissioner in the pre-  
 ' mises: As also declaring, as it is hereby expressly provided and  
 ' declared, that in the event of any one of the said instalments  
 ' remaining unpaid for three months after the same shall become  
 ' due, not only shall it be competent to me the said James Jor-  
 ' dan Wilson, and my aforesaid, to do personal diligence for  
 ' recovery of the sums contained in the aforesaid bond, and con-  
 ' stituted a real lien on the said lands as aforesaid, the respective  
 ' terms of payment thereof being come, but, notwithstanding of  
 ' any infeftment or resignation which may follow hereon in  
 ' favour of the said Thomas Douglas, it shall also be lawful to,  
 ' and in the power of me and my aforesaid, to revert to the in-  
 ' feftment in my favour before narrated, and in virtue thereof,  
 ' (and without any process of declarator to establish our right),  
 ' to sell and dispose of the whole lands and others before de-  
 ' scribed, by public roup or private sale, at such price as can be  
 ' got therefor, on previous advertisement once a-week,' &c.; ' and  
 ' to grant valid dispositions of the said lands, containing all usual  
 ' and necessary clauses for feudally investing the purchaser in  
 ' the property of the same; all which are hereby declared to be  
 ' as valid and sufficient to all intents and purposes as if these  
 ' presents had never been granted.' It was also ' expressly de-  
 ' clared, that all infeftments, instruments of resignation, or other  
 ' investitures of the said lands in favour of the said Thomas  
 ' Douglas and his aforesaid, in which the said real lien and bur-  
 ' den, and the aforesaid declarations, shall be omitted, are and  
 ' shall be null and void to all intents and purposes, and of no  
 ' avail, force, strength, or effect whatever against me, my heirs  
 ' and successors.' In like manner it was declared, in the pro-  
 ' curatory of resignation ad remanentiam, that it was granted  
 ' always with and under the real lien and burden of L.11,000  
 ' sterling, payable by the instalments before specified, interest  
 ' thereof, and penalty stipulated in case of not punctual payment,

‘ as before-mentioned.’ Douglas thereupon expedite an instrument of resignation ad remanentiam in his own favour, containing the above declaration, which was immediately recorded.

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In the course of the following year Douglas sold the property at the price of L.11,500 to the appellant, Mr James Bristow Fraser, writer in Edinburgh, and at the same time became bound to uphold the rent for 19 years at L.448, for which the lands had just been let to a tenant. The titles of Douglas, containing the burden of the price in favour of the respondent, were then laid before the appellant, who suggested, that instead of engrossing it in the disposition to him, the appellant should grant a bond and disposition to Douglas over the lands for the L.11,000. Accordingly, Douglas granted a disposition to the appellant without taking any notice of the burden, but at the same time the appellant granted a bond and disposition in security, declaring, ‘ that as L.11,000 sterling is secured as a real burden and lien on the said lands, due to James Jordan Wilson, Esq. from whom the said Thomas Douglas purchased the same,’ therefore he bound himself to pay that sum to Douglas by the same instalments and at the same times as Douglas was bound to pay them to the respondent; and it was also declared, that that sum should be a real burden on the lands; and ‘ I the said James Bristow Fraser, and my aforesaid, shall be entitled to see the same instantly paid over to the said James Jordan Wilson, his heirs and assignees, and suitable discharges and renunciations thereof, and of the said real burden or lien, granted, and recorded in the general or particular register of sasines, reversions, &c.; and shall also be entitled, in case the said James Jordan Wilson, or his foresaid, shall consent and agree thereto, to have this present bond and disposition substituted by assignation or conveyance for and in place of the bond and obligation granted by the said Thomas Douglas and his cautioners to the said James Jordan Wilson for the said principal sum and interest; and which conveyance the said Thomas Douglas and his foreshaids shall in that case grant at my joint expense;’ and this was followed by a power of sale in favour of Douglas and his assignees.

When the first instalment fell due, it was paid by the appellant, who received two separate deeds of discharge, one from Douglas to himself, and another by the respondent also to the appellant and to Douglas. To avoid the necessity of these double discharges, the respondent obtained from Douglas an assigna-

April 15. 1824. tion to the bond and disposition in security granted by the appellant, in virtue of which he was infest.

Thereafter, the tenant having become bankrupt, and Douglas being unable to uphold the rent to the stipulated amount, the appellant raised an action of damages, and obtained a decree against him for upwards of L. 9000. In the mean time, the appellant had paid the second instalment to the respondent; but when the third became due, he maintained, that he was entitled to retain it in extinction of the debt due to him by Douglas, and that, as the respondent was his assignee, he was liable to that defence. This plea having been sustained by the Court, the respondent brought an action of declarator and of removing against Mr Fraser, founding on his real right, and concluding to have it declared, 'that notwithstanding of any infestment or resignation which may have followed on the said disposition in favour of the said Thomas Douglas, or of the said James Bristow Fraser as deriving right from him, it is lawful to and in the power of the pursuer to revert to the original infestment in his favour of the aforesaid lands, and in virtue thereof to sell and dispose of the whole lands and others before described, by public roup or private sale, at such price as can be got therefor, on using the order of sale before-mentioned; and to grant valid and sufficient dispositions or other rights thereof to the purchaser or purchasers thereof, containing all the usual clauses, which shall be equally effectual to all intents and purposes as if the said disposition by the pursuer to the said Thomas Douglas had never been granted; and to apply the proceeds of said lands, after deduction of all expenses, in payment and extinction of the foresaid sum of L. 9000, annualrents thereof, and penalties stipulated therefor in case of failure in payment thereof, all as specified and contained in the deeds before narrated; as also, that it is competent to the said pursuer, and his aforesaid, to enter into the immediate possession of the lands and others before described, and to uplift, discharge, or assign the rents and duties thereof, or to attach the crop and stocking of the said lands, for payment of the said interest due and to become due since the term of Whitsunday 1814;' and also, that the appellant should be ordained forthwith to remove. At the same time he also brought an action of poinding the ground, which was conjoined with the declarator.

In defence it was maintained by the appellant,—

*First*, That no real burden had been created on the lands,

because it was not competent to do so by means of a resignation April 15. 1824.  
ad remanentiam. And,

*Second*, That as the respondent had no infeftment, he was not entitled to pursue a pointing of the ground.

The Lord Ordinary found, ' that the pursuer, James Jordan Wilson, has a real lien over the lands of Blackburn for security of the balance of the price due to him, and is entitled to bring the lands to sale for payment of the balance; and therefore, in the action of declarator and removing at his instance against the defender, and also in the process for pointing the ground, determined in terms of the conclusions of the libel.' And in a suspension and interdict of a threatened sale, brought by the appellant, his Lordship found the letters orderly proceeded. To this judgment the Court adhered on the 1st of December 1820, and thereafter on the 19th February 1822.\*

The appellant then entered an appeal, and maintained,—

1. That as a resignation ad remanentiam was the form in which a vassal returned his lands to the superior, it had merely the effect to *extinguish* the right of the vassal, and thereby to enable the superior to possess his lands without that burden; and consequently it was impossible, consistently with feudal principle, to create and constitute a real burden or lien by means of such a resignation: that it was no doubt true that it had been found, that on receiving a resignation ad remanentiam, the superior must take it subject to all the *pre-existing* burdens established by the vassal over the feu; but no instance had occurred, nor had any sanction been ever given to the creation of a real burden, by means of the procuratory of resignation itself; and therefore, as the burden in question did not exist on the lands prior to the granting of the procuratory of resignation, and as that resignation could only have the effect to reconvey to the superior the dominium utile in the state in which it was before the resignation, no valid real burden had been constituted.

2. That as the respondent's infeftment had been superseded and extinguished by that in favour of Douglas, and thereafter of the appellant, he had no sasine in the lands; and consequently he had no title to pursue a pointing of the ground.

3. That, at all events, the respondent was not entitled to

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\* See 1. Shaw and Ball. No. 357. and Fac. Coll. of the above date, where it is stated, that ' the Court founded their opinions entirely and unanimously on the above legal argument, that the real lien was properly constituted, and that the proper steps had been taken to make it effectual.'

April 15. 1824. attach the subjects, without giving credit to the appellant for all the ameliorations which he had made upon them. And,

4. That it was not relevant to allege that the appellant had been aware of the existence of the burden at the date of making his purchase; because, as he was a singular successor, he could not be affected by it if it was not aptly constituted.

On the other hand, it was maintained by the respondent,—

1. That although, strictly speaking, a resignation *ad remanentiam* extinguished the feu held by the vassal, yet the property did not return to the superior as he originally gave it out; but, on the contrary, it returned with all the burdens created by the vassal; so that a resignation *ad remanentiam* was in truth nothing else than a transference of the property from the vassal to the superior, differing in no other respect from any other transference, except in the mode of completing the title; which difference consisted in this, that instead of there being a disposition and precept of sasine, followed by an instrument of sasine, there was a procuratory of resignation followed by an instrument of resignation, which was recorded and published like an ordinary instrument of sasine; so that in substance there was no distinction between a burden created by means of an instrument of resignation, and by a sasine.

2. That if the respondent had a real burden over the lands, he was entitled to make it effectual by means of a pointing of the ground; and besides, he had expressly reserved right to revert to his infeftment, if necessary to realize payment of his debt.

3. That as he was not attempting to set aside the sale in favour of the appellant, and so appropriate the subjects to himself, (in which case the appellant might have an equitable demand for the ameliorations), but as he was merely availing himself of his rights as a creditor to recover payment out of the subjects pledged to him, he could not be affected by any such plea. And,

4. That as the appellant was a professional person, and was fully aware of the existence of the debt, and had expressly acknowledged it in the deed granted by him, and bound himself to see it paid, he was barred from insisting on the formal objections maintained by him.

The House of Lords ‘ordered and adjudged that the appeal be dismissed, and the interlocutors complained of affirmed, with L. 100 costs.’

LORD GIFFORD.—My Lords, In the case in which James Bristow Fraser, Esq. is appellant, and James Jordan Wilson, Esq. respondent, which was heard before your Lordships the last day I attended this

House, I am to address to your Lordships a few observations before I move you to come to the decision which I propose to do if your Lordships shall concur with me in this case. April 15. 1874.

This is an appeal against an interlocutor of the Lord Ordinary in the Court of Session, which found, 'that the pursuer, the respondent,' Mr James Jordan Wilson, 'has a real lien over the lands of Black-burn for security of the balance of the price due to him, and is entitled to bring the lands to sale for payment of the balance. In the action of declarator and removing at his instance against the defender, and also in the process of poinding the ground, decerns in terms of the conclusions of the libel; and in the suspension and interdict presented by the defender (the present appellant) of the threatened sale, repels the reasons of suspension, finds the letters and charge orderly proceeded, and decerns.' This interlocutor of the Lord Ordinary was afterwards affirmed by the Second Division of the Court of Session, and that interlocutor also forms the subject of appeal.

The facts of this case are shortly these:—Mr Wilson, the respondent, in the year 1809, became the purchaser of the estate in question from a gentleman of the name of Douglas for the sum of L.10,600; Mr Douglas having by the agreement become bound that the lands would be let on lease at a rent of L.4. 4s. per acre, or to become himself the tenant thereof at that rent. This agreement was carried into effect, the price was paid, and the respondent, Mr Wilson, obtained from Mr Douglas a disposition or conveyance of the lands, property and superiority, containing a procuratory of resignation in favorem, precept of sasine, and all other usual clauses. Upon the precept of sasine contained in this disposition the respondent was infeft in the lands by instrument of sasine. By this proceeding, in the language of the law of Scotland, he was base infeft in the property, with power to make his right a public one, either by confirmation or resignation by charter from the crown. That proceeding, however, never took place, and the superiority therefore remained in Mr Douglas. Some short time after his purchase had been completed, Mr Wilson was desirous of disposing of this estate, and a new agreement was entered into betwixt him and Mr Douglas, by which Mr Douglas agreed to repurchase those lands from the respondent at the price of L.11,000, payable by instalments. The price had been originally paid by Mr Wilson to Mr Douglas, but on the resale it was agreed that Mr Douglas should secure the L.11,000 to be paid by instalments, and therefore he did not pay the purchase-money to Mr Wilson, the present respondent.

My Lords,—In consequence of this agreement, it was thought that the proper mode of reconveying this estate to Mr Douglas would be by a disposition in his favour by the respondent, containing simply a procuratory of resignation ad remanentiam; and, my Lords, in consequence of that, there was a disposition made by Mr Wilson of the premises to Mr Douglas, by which he did convey those

April 15. 1824. lands to Mr Douglas; but it was declared, that the L.11,000 should be considered as a real lien or burden upon the lands until the money was paid. It was to be paid by three instalments of L.1000 each at particular periods stated in the reconveyance, and the residue, L.8000, was to be paid at a more remote period; but there was a declaration, that whenever any of the instalments should not be regularly paid, it should be competent for Mr Wilson to sell those lands in order to recoup himself that portion of the price which at that time remained unpaid; and, my Lords, in consequence of this there was a disposition and procuratory of resignation, in which procuratory of resignation the same condition was inserted, that these lands were to be resigned to Mr Douglas, 'always with and under the real lien and burden of L.11,000 sterling, payable by the instalments before specified, interest thereof, and penalty stipulated in case of not punctual payment as before mentioned, and with and under the several provisions and declarations before written.'

After this transaction had taken place, Mr Douglas contracted for the sale of this property to the present appellant, Mr Fraser, for the advanced price of L.11,500. It is not necessary to trouble your Lordships with the contract between Mr Fraser and Mr Douglas; it is sufficient to state to your Lordships, that Mr Fraser, at the time he purchased, was fully aware of the nature of the contract between Mr Wilson and Mr Douglas, by which it was agreed that there should be this burden on the land; but in consequence of this increase of price, and Mr Fraser not being quite satisfied that the value of the land then let was equal to the rent at which they appeared to be let, he took a guarantee from Mr Douglas that the lands were worth the rent at which they were then let. Mr Fraser, the appellant, being fully aware of the state of things between Mr Douglas and Mr Wilson, afterwards took a conveyance of the property from Mr Douglas. Two of the instalments were paid by Mr Fraser to Mr Wilson, but on the third becoming due, payment was refused by him. He had then discovered that the lands were not worth the sum at which they were valued, and he raised an action of damages, and recovered against Mr Douglas a very considerable sum of money. I should rather say he took judgment against him for a very considerable sum of money, as damages to be paid to him in consequence of the lands not being of the value at which they were reckoned by Mr Douglas. Finding, therefore, that he had been deceived in the value, he resisted the payment of the third instalment to Mr Wilson, and then contended, that, by the law of Scotland, the burden which had been attempted to be laid on this property as a real lien did not affect it; that therefore he was not bound to pay it, and Mr Wilson, the present respondent, had no right to insist upon his paying him the residue of the price then due to him. In consequence of this, a process of declarator was brought by the respondent, Wilson, against Mr Fraser, and also against the trustee on the sequestrated estate of Douglas, who in the mean time had be-

come insolvent, and that process concluded,—(Here his Lordship read the conclusions of the summons,—see p. 166.) At the same time he brought an action of poinding the ground, the only process competent in such circumstances to a creditor in a debitum fundi for attaching the fruits of the soil for his debt. April 15. 1824.

My Lords,—These two actions were conjoined, and against the first of these actions the appellant gave in the following defences:—‘*First*, To warrant a pursuer to insist in a process of declarator and removing, or other real action, an infeftment in the lands libelled is indispensably necessary, but the pursuer has not produced or founded upon any such infeftment. *Secondly*, et separatim, The pursuer is not effectually vested in any real lien over the lands libelled, in security of certain sums of money, as he alleges, and the defender is not due the sums libelled.’ My Lords, after a variety of procedure, the Lord Ordinary pronounced the interlocutor read to your Lordships at the outset of the observations I have addressed to your Lordships. That decision of the Lord Ordinary being brought under the review of the Court, on advising the petition, with answers thereto, their Lordships pronounced an interlocutor on the 1st of December 1820, by which ‘they adhered to the interlocutors reclaimed against, refused the desire of the petition, and found the petitioner liable in the expenses incurred since the 13th of May 1818, being the date of the Lord Ordinary’s first interlocutor on the merits.’ My Lords, that decision was again brought under the review of the Court, and they pronounced another interlocutor by which they adhered to the interlocutor reclaimed against.

My Lords,—Undoubtedly the important question in this case is, Whether the Lord Ordinary in this case, and subsequently the Court of Session, have come to a right conclusion, in affirming that Mr Wilson had a real lien over the lands of Blackburn for security of the balance of the price due to him, and entitled in consequence to bring the lands to sale for the payment of the balance in the action of declarator? And undoubtedly, my Lords, this case involves a question of some nicety, and some subtlety in Scotch conveyancing. My Lords, I have stated to your Lordships that it appears to be distinctly admitted, and I think will not be doubted, that this bargain would have been clearly valid and effectual against a third person, had this resignation been, in the language of the Scotch law, a resignation in favorem; there can be no doubt that this burden would have been well created on these lands. I say, not only has this been admitted, but it appears to me, on reference to the writers of the law of Scotland, that no doubt could be entertained upon that subject. My Lord Stair, I think, seems to be precise on that subject, in Book iv. tit. 35. § 24., in which he says, that ‘if an infeftment be granted with the burden of a sum, it makes that sum a real burden;’ and the same is laid down in Mr Erskine’s Institutes, and in his Principles, in more than one place.



April 15. 1824.

My Lords,—However, it is said in this case, that this burden cannot be created by a resignation ad remanentiam; and I will just state to your Lordships what a writer on the law of Scotland defines a resignation ad remanentiam to be. Lord Stair, in Book ii. tit. 2. § 1. (Here his Lordship read the passage). Then he states afterwards the statute of 1669, ‘whereby instruments of resignation are null if not ‘registrate within sixty days,’ &c. Then he states the effect of this resignation.

My Lords,—The instances put by Lord Stair are instances of burdens created before the resignation ad remanentiam, and therefore a distinction has been taken at the Bar, and very powerfully argued, that you cannot, in the same instrument, at the same time when the resignation ad remanentiam takes place, create the burden; for that the effect of this resignation ad remanentiam is not the transmission of the right, but an extinction of the right, which becomes consolidated in the superiority in the hands of the superior.

My Lords,—In Mr Erskine’s Principles, he states the effect of the resignation ad remanentiam in the words I will read to your Lordships. (Reads). So that he says that the effect of the resignation ad remanentiam, as it respects the superior, is, that no sasine is necessary, and the effect of it is to consolidate the property which the vassal receives with the superiority, and therefore to extinguish the minor right; and therefore Mr Erskine says, ‘that resignations ad remanentiam ‘are truly extinctions, not transmissions, of a right;’ but then undoubtedly it is a qualified extinction, for he goes on to state, that it would not have the effect of extinguishing any real burden which may have been created by the vassal, B. ii. t. 5. § 35.; and he says, ‘This sort ‘of resignation was not ordained to be recorded by the Act 1617 for ‘registering real rights, which omission, because it weakened the security of singular successors, is now supplied by the statute 1669.’

It seems, therefore, from these passages I have read to your Lordships, that according to the principle of the law of Scotland, as I understand it, in these resignations ad remanentiam those burdens are effectual against a superior which would have been effectual against a singular successor; and the only question, and, as I have stated, one of considerable nicety, is this, Whether such a real burden can be created by an instrument of resignation ad remanentiam? or Whether it must be created before? If created before, there is no doubt upon the subject, because undoubtedly, by the passage I have cited to your Lordships, it would be effectual. Now, my Lords, on the best consideration I can give to this case, and seeing as I do, that such a burden as this would be clearly effectual against a singular successor on a resignation in favorem, I must confess it does appear to me, that, according to the principles of the law of Scotland, this was a real burden effectually created upon this land against the purchaser; and, my Lords, undoubtedly that was the clear opinion of the Lord Ordinary before whom the case was heard, and it was the unanimous opinion of

April 15. 1894.

the Second Division of the Court of Session, on a review of that decision, and on a consideration of the principles to be extracted from the passages from my Lord Bankton and Sir George Mackenzie—passages cited in the appeal papers, which have been so fully commented upon at your Lordships' Bar that I have not thought it necessary to trouble your Lordships with them. Upon these authorities the Court of Session were of opinion this was a real burden, and effectually created; and a passage was referred to in a work of considerable authority in the law of Scotland, I mean Mr Ross's Lectures on Conveyancing, in which, undoubtedly, it appears to be his opinion, and is distinctly stated as such, that such a burden as this is would be effectual against the superior; and, my Lords, in point of convenience, one cannot see the least objection to this. This burden occurs in the instrument of resignation to Mr Douglas. It must appear, therefore, to every person who took the trouble, as it is the practice of that country to register records under the statute of 1669, to make reference to that record, that this estate had been surrendered to the superior with this qualification; and undoubtedly it was competent to any person treating with this superior, to make any agreement which he thought fit with respect to the terms on which he meant to resign the property to him; and though necessarily we could not get at what we might conceive the justice of the case, if the appellant could succeed in shewing that this has not created a real lien on the lands, and that therefore Mr Wilson, in this form, had no right to bind the lands with it, yet upon the whole it appears to me, as I have already stated, that the lien is well created. Undoubtedly it is a case of great intricacy, and great nicety, one on which I have heard no express decision cited at your Lordships' Bar, and in which, therefore, we are bound to refer to the principles on which these instruments are framed, and the principles of the law of Scotland: and on the most attentive and anxious consideration of a case, which, to a person more versed in English law, is of considerable nicety and difficulty, upon the whole it does appear to me, that the Lords of Session have come to a right conclusion, and that therefore this interlocutor ought to be affirmed.

My Lords,—Before I conclude the few observations I have further to make, I should state, that another point has been made in this case, with respect to the amelioration of this property since the purchase by the appellant; and he says, though you may have a right to sell the land to recoup yourself the price, you have no right to recoup yourself that price through the medium of improvements from money laid out by me since I had possession of the estate; and upon this part of the case, a decision was very much pressed upon your Lordships of the York Buildings Company. It appears to me that case has no bearing whatever. That was a proceeding to reduce a sale, on the ground that the party was in that situation that he ought not to have become the purchaser; and when that case came before this House, they said this,—If you seek to reduce this sale, on the ground that

April 15. 1824. this party was an agent or a trustee, and ought not to have made the purchase, we will, at your desire, reduce the sale, and put the parties in statu quo,—you will get back the land, and the party will get back his purchase-money; but you ought not, at the same time, to get the benefit of the improvements he has made; you have no right as against the purchaser, who has thus, by a principle of law, been declared incompetent to become the purchaser, to dispossess him, without at the same time paying him that which he has fairly expended on the improvements of the land. But this is not a proceeding to reduce the sale to Mr Fraser or Mr Douglas. Mr Wilson says,—I care nothing about the sale; the land was pledged to me for the price for which I sold the estate, and all I seek for now is the price: if you will pay me the price, I am satisfied; if you do not choose to pay me the instalments, I seek to repay myself that portion of the price which you have not paid me. If you have made improvements, you may get the benefit of them in the sale of the property; but all I seek is the money effectually secured on this land, and you have in the mean time improved it with the full knowledge that the land was pledged to me. Therefore it does appear to me there is no ground whatever for that claim on the part of the appellant, and that the interlocutor, therefore, was right.

I do not trouble your Lordships on the minor points in this case, which were elaborately discussed at the Bar. I have thought it due to this case, which is one of great nicety and difficulty, and of great importance to the law of Scotland, to state humbly to your Lordships the grounds on which I have felt it right to recommend to your Lordships to affirm the interlocutor, though it is not usual in ordinary cases to assign reasons for the affirmance of interlocutors where the House of Lords concurs. There was another point with respect to the poidning process I have not noticed, because I concur entirely in the reasons which have been given by the Court of Session; therefore, upon the whole, I shall humbly move your Lordships to affirm the interlocutor.

My Lords,—I cannot help saying in this case, I think your Lordships should give some costs, and I will tell your Lordships why. I cannot think this is a very gracious objection on the part of the appellant. He purchased the land, well knowing of the burden; he took it with the lien. He is also, I observe, a gentleman in the law, and therefore undoubtedly more likely to be aware of the effect of such a security, and therefore not likely to be taken unawares or unguardedly. My Lords, the respondent has been kept out of the price now for a long period of time, and has been subject to considerable inconvenience. The judgment of the Court below was an unanimous judgment, and on the petition they still adhered to that judgment. I do not mean to say, that because the judgment was unanimous, the costs should follow on an appeal from that judgment. There have been cases in which a decision is desirable for the parties, and in which it may be a fair

question to be brought before your Lordships ; but I will only say, this point of law is not one on which Mr Fraser, the appellant, had a right to demand the judgment of your Lordships. Under these circumstances, I think your Lordships will concur in the judgment given below. This is a case in which he ought to have the expense of that discussion fall upon him. I shall therefore humbly move your Lordships that the judgment be affirmed, with L.100 costs. April 15. 1824.

*Appellant's Authorities.*—2. Stair, 2. 1.; 2. Ersk. 7. 19.; 2. Stair, 11. 5.; 2. Ersk. 5. 1.; 2. Ersk. 7. 22.; Redfern, March 7. 1816, (F. C.); Heriot, June 26. 1668, (6901.); Gall, Feb. 6. 1729, (10,306.); Sutherland, Dec. 1. 1664, (7229.); Argyll, Feb. 13. 1730, (10,306.)

*Respondent's Authorities.*—2. Ross, 239.; Mackenzie's Observations, 1663, ch. 2.; 2. Stair, 2. 5.; 2. Bank. 11. 8.; 4. Ersk. 1. 2.

A. FRASER—J. BUTT,—Solicitors.

(*Ap. Ca. No. 31.*)

WILLIAM DIXON, Esq. Appellant.—*Warren—Fullerton.*

No. 24.

W. F. CAMPBELL, of Shawfield, Esq.—*Murray—Abercromby—Walker.*

*Mutual Contract—Landlord and Tenant—Coal.*—A lease of coal having been granted, with a stipulation that if the coal, 'by unforeseen accidents' occurrence, dykes, or 'troubles not occasioned by irregular or improper workings, it shall become, in the opinion of skilful men, mutually chosen by the parties, incapable of being wrought to advantage,' the tenant should be entitled to abandon; and men having been appointed, who reported, that, so far as physical difficulties existed, the coal was capable of being worked, but that, from the state of the markets, &c. this could not be done to advantage;—Held, (qualifying the judgment of the Court of Session,) That the tenant was not entitled to abandon.

IN the month of June 1815, the respondent let to the appellant a lease of part of the coal in his lands of Woodhall, for 19 years, at a fixed rent of L.900, or, in the landlord's option, of a lordship of 6d. for each cart. By the lease it was inter alia declared, that 'in the event of the coal becoming exhausted, or that by unforeseen accidents' occurrence, dykes, or troubles not occasioned by irregular or improper workings, it shall become, in the opinion of skilful men, mutually chosen by the parties, incapable of being wrought to advantage, then, and in that case, it shall be in the power of the said William Dixon, and his foresaids, to relinquish the work, and to renounce and give up the present lease April 30. 1824.

2D DIVISION.  
Lord Reston.

April 30, 1824. ' thereof at the first Whitsunday or Martinmas after an inspection and report to that effect is made; in which event, these presents are declared to be from such term void, and at an end, to all intents and purposes, the same as if the whole years thereof were naturally elapsed.' The appellant accordingly proceeded to work the coal, but afterwards alleging that certain dykes or troubles had occurred, and that the dues payable for transporting coals to Glasgow, (where his market was), through the Monkland canal, had been greatly increased, whereby it was impossible to work the coal to advantage, he gave notice of his intention to abandon the coal-work. In consequence of this, the agents for the parties addressed a letter to Messrs Hugh Baird and Robert Bald, civil engineers, in which, after mentioning that they had now put into their hand the lease of the coal-work, and after reciting the above clause, they stated, that ' With reference to the clause now quoted, we nominate and appoint you to inspect the works, consider the lease, and report your opinion, Whether the coal in question is now become incapable of being wrought to advantage under the said lease?' In consequence of this appointment, these gentlemen examined the work, and made up a report, in which, after entering into a detail, they stated, that, ' taking into our consideration the state of the colliery, we are of opinion that, although the slips before-mentioned have been, and must be attended with considerable extra expense in the workings, particularly from the magnitude of the large slip, and the circumscribed limits in which pits are allowed to be sunk; yet the coals are not considered by us as unworkable: but, upon considering the circumstances of the coal trade when the lease was entered into, the occurrences which have taken place, both in regard to the alteration of canal dues, and the present low price of coals in the Glasgow market, where the principal sale must be, we are of opinion that the Woodhall colliery cannot, under these circumstances, be wrought with advantage to the tacksman under the present lease.' In consequence of this report the appellant abandoned the work, and the respondent having given him a charge of payment for rent, he brought a suspension, and also an action of declarator, in which he concluded to have it found, that the tack was null and void from the period when the coal became unworkable to advantage. These processes having been conjoined, the Lord Ordinary, ' in respect of the change which has taken place since the date of the lease in the expense of working the

‘ coal; state of the markets, and other circumstances, suspended April 30. 1824.  
 ‘ the letters simpliciter.’

Thereafter, on advising a representation, his Lordship, before answer, remitted to Messrs Baird and Bald to make a new report; in consequence of which these gentlemen reported, inter alia, that ‘ had the state of the market of coals been the same at the date of that report as we have since found it, we would have given it as our opinion, that the Woodhall colliery would have been workable with advantage to the tacksman under the present lease. But we beg leave to remark, that the great quantity of coals which must be put out at this colliery in order to cover the high fixed rent, being forced into the market, may have the effect of lowering the price of coal in Glasgow, and it may even be the means of reducing the price so much as to render the colliery not workable with advantage to the tacksman, as at the date of our last report; because, from its great distance, and high fixed rent, it must be amongst the first that suffers from any competition in, or depression of, the coal market.’

His Lordship then reported the case to the Court, accompanied by the following note:—‘ The second report of Messrs Baird and Bald leads the Ordinary to doubt, not of the principle of the former interlocutor, but of the facts necessary for its application. He remains of opinion, that the market-price must always be an essential ingredient in the question of workable or not workable in a coal lease; and the word “occurrence” in the present lease is broad enough to include an extrinsic circumstance of this nature. Nor does its requiring an inspection of neutral persons of skill at all affect this interpretation. Although the price fall, it may happen that the coal may become more easily wrought than formerly, so as to remain workable with advantage to the tenant. The first report here was formed partly on the slips in the mine, and partly on the depreciation in the market-price.

‘ But although the market-price be an important ingredient in the result, it is not to be inferred that the tenant is not to bear all reasonable risk in the variation of price. A tenant who has made profit for years, could not reasonably renounce his lease on the occurrence of a few weeks of temporary depression. The depression, to avail him, must be considerable, and likely to be permanent. The Lord Ordinary is inclined to think, from the second report, that such depression has not, in this case, yet taken place.

‘ It was said, that a report favourable to the tenant being once

April 30. 1824. ' given, his right of renouncing cannot be affected by a state of  
' the market, occurring even a few weeks after the date of said  
' report. But it rather appears that this is not giving the same  
' equitable interpretation to the mutual contract which is asked  
' from the landlord.

' Doubts were likewise hinted as to the accuracy of the second  
' report. The lease, however, excludes other evidence.'

When the case came before the Court, their Lordships, before answer, again remitted to Messrs Baird and Bald, to reconsider their former reports, ' and to inquire into and specify  
' more particularly the occurrences alleged to have taken place  
' regarding the expense of carriage, and the causes which have  
' occasioned the alleged downfall of the price of coal in the  
' Glasgow market since the lease was entered into; and how far  
' these occurrences and consequences appear to have been un-  
' foreseen at that period; and whether from their nature they are  
' likely to be permanent, or only temporary and fluctuating; and  
' to report their opinion as to the average price the coals in  
' question ought to bring, in order to render them workable with  
' advantage, in terms of the lease.' A proof was then taken by  
them, under a power to that effect, as to the prices of coals,  
which they found had varied between 1813 and 1819, from 5s.  
7d. to 4s. 5d. per cart; and they stated, that ' in taking these  
' averages, the principles upon which we have proceeded have  
' been, to take the periods and prices of each year as given us by  
' the witnesses, without regard to the quantity; and this principle  
' was necessary, as we had taken the periods and prices in fram-  
' ing our former report, and not the quantities. In our opinion,  
' therefore, the price of coals is likely to fluctuate and be lower  
' in the Glasgow market than prior to 1817, and that while the  
' out-put of so many collieries can with ease more than supply  
' the demand.'

On advising this report, the Court, on the 9th of February 1821, found ' that in hoc statu there is not sufficient evidence to  
' instruct that the coal in question is incapable of being wrought  
' to advantage;' and therefore repelled the reasons of suspension,  
assoilzied from the declarator, and found no expenses due.

An appeal was then entered by the appellant, who contended that the judgment of the Court was erroneous,—

1. Because, as it was expressly stipulated in the lease, that if the coal ' shall become, in the opinion of skilful men mutually  
' chosen by the parties, incapable of being wrought to advantage,  
' then, and in that case, it shall be in the power of the said

‘ William Dixon, and his foresaids, to relinquish the work;’ and as two men of skill had been mutually chosen, and given their opinion that the coal could not be worked to advantage, their report was equivalent to a decree-arbitral, which it was incompetent for the courts of law to review on the ground that their decision was erroneous; and therefore, in terms of the contract, the lease had come to an end. And,

April 30. 1824.

2. Because it was not competent for the Court of Session to order subsequent reports from these gentlemen; and as their judgment rested upon these reports, it was founded in error. To this it was answered,—

1. That the stipulation in the lease had plainly reference to the coal not being workable on account of physical difficulties, and not on account of the state of the markets, or the expense of carriage: that Messrs Baird and Bald had in their original report expressly stated, that, in regard to physical difficulties, ‘ the coals ‘ are not considered by us as unworkable;’ and that although they no doubt reported, that, from the state of the markets, it could not be wrought to advantage, yet they were not entitled, in terms of the clause, to take that circumstance into consideration. And,

2. That, supposing they were so entitled, still as it was necessary to take into consideration the state of the markets for a considerable period of time, and as they had now reported that the coal might be worked to advantage, the appellant was not entitled to abandon it.

The House of Lords found, ‘ That in hoc statu it was not in ‘ the power of William Dixon to relinquish the work, and give ‘ up the lease. And therefore it is ordered and adjudged, that ‘ the interlocutor of the 9th February (signed 13th February) ‘ 1821, complained of, which, in the suspension, repels the reasons of suspension, finds the letters orderly proceeded, and ‘ decerns; and which, in the action of declarator, sustains the ‘ defences, assoilzies the defender from the conclusions of the ‘ libel, and decerns; and which finds no expenses due to either ‘ party, be, and the same is hereby affirmed: And the Lords ‘ further find, that, under the circumstances of this case, and in ‘ respect of the preceding finding, it is unnecessary to make any ‘ order in regard to the several other interlocutors complained of.’

**LORD GIFFORD.**—It is not usual for the person who has the honour of advising your Lordships in matters judicial, to detail the reasons upon which his opinion is founded, if that opinion shall go to an affirmance



April 30. 1824. of the judgment below; but although I shall conclude with a motion to that effect in this cause, I think it necessary, from the nature of these proceedings, to trouble your Lordships with a few observations.—

My Lords,—This question depends upon the construction to be put upon a clause in the lease of a coal-mine; and it merits consideration, that this clause occurs immediately after the stipulations respecting the mode in which the lessee shall work the colliery. This lease was executed in 1815; and it appears that, in two years afterwards, the lessee seems to have conceived that such circumstances had occurred as entitled him to call for the opinions of persons of skill, who might decide whether, under the above clause, he was entitled to get free of the lease. There had been an *ex parte* report, which I lay entirely out of consideration; but afterwards there was a report from men mutually chosen by the parties, the terms of which are of great importance in the decision of this cause. In the first place, they say, ‘Taking into our consideration the state of the colliery, we are of opinion, that although the slips before mentioned have been, and must be, attended with considerable extra expense in the workings, particularly from the magnitude of the large slip, and the circumscribed limits in which pits are allowed to be sunk, yet the coals are not considered by us as unworkable.’ So far, this report can give no ground for annulling the lease. But, (the reporters go on to say), ‘upon considering the circumstances of the coal trade when the lease was entered into, the occurrences which have taken place, both in regard to the alteration of canal dues, and the present low prices of coal in the Glasgow market, where the principal sale must be, we are of opinion, that the Woodhall colliery cannot, under those circumstances, be wrought with advantage to the tacksman under the present lease.’ No such expression as tacksman occurs in the clause which I have just read from the lease. It merely says, ‘incapable of being wrought to advantage.’

My Lords,—The appellant contends, that on a fall in the price of coals he was entitled to get rid of this lease; as this was one of the unforeseen circumstances, the possibility of which had been contemplated as forming the stipulation in question. But I hold this not to be the right construction, and am of opinion, that parties must have had in view occurrences in the mine, and not in the price; otherwise, if the fall had been so inconsiderable as to afford in any one year a rent of L. 850, instead of L. 900, the tenant might have thrown up the lease. In the course of 19 years there must necessarily be some variation in the prices, of which parties could not fail to be aware when they entered into the contract. The word ‘occurrence’ comes immediately after the words ‘unforeseen accidents.’ If the coal had been exhausted, then indeed the lease must have been at an end; but if the quantity brought had only diminished, it must still remain in force. At the same time, my Lords, I cannot throw the prices entirely out of consideration, as accidents, or obstructions, or troubles in the mine, might affect the price.

In conclusion, my Lords, I may observe, that the appellant has held the report of the two referees as equivalent to a regular decret-arbital. But supposing these gentlemen had possessed powers to conclude the parties, the Court below were, and your Lordships are now entitled to look at the grounds of their opinions; and if these grounds, as detailed in their several reports, are found to be unsatisfactory, your Lordships may and must decide upon the facts as they appear in the cause.

Upon the whole, my Lords, I humbly offer it as my opinion, that the last interlocutor of the Court of Session ought to be affirmed. There may be some difficulty as to the findings in some of the previous interlocutors, for which reason I would propose to delay giving formal judgment until Tuesday next.

SPOTTISWOODE and ROBERTSON—J. CHALMER,—Solicitors.

(*Ap. Ca. No. 93.*)

Sir WILLIAM F. ELIOTT, Appellant.—*Sugden—Whigham.*  
GEORGE POTT, Respondent.—*Moncreiff—Jeffrey.*

No. 25.

*Bona Fides—Violent Profits.*—Circumstances in which (affirming the judgment of the Court of Session) a party was found not liable for violent profits, prior to the first term after the judgment of the House of Lords setting aside the lease as contrary to the terms of an entail.

AFTER the judgment of the House of Lords, pronounced on the appeal of Sir William Francis Elliott, of Stobs, against George Pott, tenant of two of the farms on that estate, finding that his lease was contrary to the terms of the entail of the estate, and therefore reducing it, (see ante, Vol. I. p. 16.) the case returned to the Court of Session, to decide upon a demand made by Sir Francis for payment of the violent profits. In reference to this claim, the facts were these:—

By two judgments of the Court of Session, in 1793 and 1798, it had been found, that as the heir of entail of the estate of Stobs was laid under no restriction, he 'had power to grant leases at 'the former rents, and take grassums.' Previous to this time, the appellant's grandfather, who was then in possession, had, in 1784, let to the father of the respondent the lands of Langside, part of the entailed estate, for 19 years, at a rent of L. 195; and, in 1790, he again let him the lands of Penchrise, also for 19 years, at the

May 10. 1824.

1st DIVISION.  
Lords Gillies and  
Meadowbank.

May 10. 1821. rent of L.84;—the total rent being thus L.279. In 1794, and soon after the first of the above judgments, and after consulting two of the most eminent Counsel at the Scottish Bar as to the legality of the transaction, an agreement was entered into between Sir William Elliott, the appellant's father, who had recently succeeded to the estate, and the father of the respondent, by which it was arranged, that the former should grant a new lease to the latter for 77 years at a rent of L.285, and payment of a grassum of L.2904. This grassum was accordingly paid, the lease executed, and possession obtained and enjoyed without objection till 1812, when Sir William having died, was succeeded by his son, the appellant. Within six months thereafter, the appellant raised a summons of reduction of the lease, alleging that it had been granted in fraudem of the entail, and concluding for payment 'of the sum of L.1500 sterling, or such other sum as our said  
' Lords shall find to be the yearly worth and value of the lands  
' and others contained in the said tack or lease, and that for the  
' current year of 1812; and of the like sum for every subsequent  
' year during which the defender may continue to possess the  
' same.' Every receipt for rent was qualified with a special reservation of this claim.

After a great deal of procedure, the Lord Ordinary and the Court, by repeated interlocutors, sustained the lease, and assoilzied the respondent; but, on the 14th of March 1821, the House of Lords reversed that judgment, and decerned in the reduction; (see ante, Vol. I. p. 16.) A motion was then made by the appellant before Lord Gillies, for decree against the defender for payment of the violent profits from the period of his succession to the estate; but his Lordship found, 'that the defender  
' can be considered in mala fide in possessing the farm in question  
' only from the date of the judgment of the House of Lords, pronounced on the 14th of March 1821, reversing the interlocutors of the Court of Session: that the defender is therefore not  
' liable to account for violent profits for crop 1820, and preceding crops; and as to the claim made by the pursuer for violent  
' profits for crop 1821, appoints the Counsel for the parties to be  
' ready to debate at next calling.' To this judgment Lord Meadowbank adhered, and the Court, on the 30th May 1822, refused a petition without answers.\*

Thereafter, the case went back to Lord Meadowbank to decide

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\* See I. Shaw and Ballantine, No. 499.

the point reserved by Lord Gillies, and his Lordship thereupon found 'the defender not liable to account for violent pro-  
'fits preceding the term of Whitsunday 1821;' and to this interlocutor the Court adhered on the 29th June 1822: Sir William then appealed to the House of Lords, where the same arguments were maintained on both sides as in the Queensberry cases, (see ante, Vol. II. p. 43-96.), which were heard at the same time. The House of Lords, agreeably to the decisions in these cases, 'ordered and adjudged that the appeal be dismissed, and the  
'interlocutors complained of affirmed.'

May 10. 1824.

*Appellant's Authorities.*—2. Ersk. 1. 25, 26.; Thomson, Feb. 17. 1624, (1737.); Cunningham, Feb. 19. 1635, (1738.); Hume, Dec. 2. 1635, (1739.); McCaull, Jan. 19. 1636, (1740.); Manderston, March 21. 1637, (1741.); Kirkland, Nov. 27. 1685, (1741.); King's Advocate, June 26. 1728, (1742.); Grant, Nov. 1633, (1743.); Reid, July 7. 1708, (Mor. 1744.); Cardross, Jan. 2. 1711, (1747.); 41. Voet, 1. 29. and 31.; 2. Stair, 3. 23.; 2. Ersk. 1. 28. and 29.; Cockburn, Feb. 12. 1697, (1732.); Milne, July 19. 1715, (1759.); Oliphant, Nov. 30. 1790, (1721.); Wedgewood v. Catto, June 13. 1820, (not. rep.); Duke of Athol, June 20. 1822, (1. Shaw and Ball. No. 560.)

*Respondent's Authorities.*—2. Ersk. 1. 27.; Cases in Mor. App. voce Bona et Mala Fides; 1. Stair, 7. 12.; 1. Bank. 8. 12.

J. RICHARDSON—J. CHALMER,—Solicitors.

(Ap. Ca. No. 36.)

A. THOMSON, (Gourlay's Trustee), Appellant.—*Moncreiff*— No. 26.  
A. Murray.

B. GOURLAY, and Others, Respondents.—*D. of F. Cranstoun*—  
Matheson.

*Bankrupt—Jus Crediti, or Spes Successionis.*—A party, in consideration of the renunciation of a lease by his son, who was about to be married, having granted a bond of provision obliging himself to pay to the children of the marriage a sum of money at the first term after his own death; and a relative contract of marriage having, on the faith thereof, been executed between the son and his intended spouse, by which the bond was assigned to trustees for behoof of the children nascituri; and the granter having become bankrupt, and children having come into existence;—Held, (affirming the judgment of the Court of Session), That the children were entitled to be ranked as creditors on the estate of the granter of the bond.

OLIVER GOURLAY, Esq. proprietor of the lands of Pratis, situated in the county of Fife, granted a lease of them to his  
eldest son, Robert Gourlay, at a rent of L.900, and on which it

May 11. 1824.

1st DIVISION.

May 11. 1824. was alleged Robert made improvements to the extent of about L. 3000.

In 1807, Robert became engaged to marry Mrs. Jane Stuart, a widow lady, who was possessed of about L. 2000, besides an annuity; and an arrangement was then entered into, through a Dr Arnott, between Robert and his father, by which the latter offered to him either a conveyance of the property of Pratis, estimated at L. 20,000, subject to a debt of L. 10,000, or an annuity of L. 300, and at his death of L. 150 to his widow, and a sum of L. 4000 to his children. Robert having accepted of this latter alternative, his father, on the 29th of July, addressed to him this letter:—‘ As you have made your election of accepting the former of the two proposals contained in the Reverend Dr Arnott’s letter to you of the 22d current, I therefore, in terms thereof, agree that you shall be discharged of the rent for the Mains of Pratis, crop 1806, and the four preceding years; and that you shall continue to possess the same for crops 1807 and 1808, at the yearly rent of L. 300 sterling, you discharging me of all claims you may have for buildings and improvements; and at Martinmas 1808 you shall enter upon an annuity of L. 300 sterling, payable at Whitsunday and Martinmas thereafter, by equal portions, during your life. Upon your removal from the farm of Pratis, which you become bound, by acceptance hereof, to do at Martinmas 1808, you shall be entitled to the whole stocking, in order to enable you to take and stock another farm for yourself; and, in the event of your marriage, and your wife surviving you, she shall be entitled to the half of said annuity, viz. L. 150 sterling per annum, payable at Martinmas and Whitsunday thereafter, by equal portions, during her life. I farther engage to make a provision for the children of your marriage of L. 4000 sterling, payable at the first term of Whitsunday or Martinmas after my death; but declaring, that I am not to be liable for any debts that you have contracted, or may hereafter contract; and, on these conditions, I become bound to grant you my bond for performing the foresaid stipulated articles, in full and ample form, when required so to do. I am,’ &c.

In consequence of this letter, a bond was executed by the father on the 10th of August; and on the same day a contract of marriage was executed between Robert Gourlay and his wife, and the marriage thereupon took place. The bond was granted on the narrative of the letter of the 29th of July, and after obliging the father to pay L. 300 per annum to Robert during his life, and L. 150 to his widow, proceeded in these terms:—

And farther, 'in the event of the said Robert Gourlay marrying, I hereby bind and oblige myself, and my aforesaid, 'to make payment to him of the sum of L.4000 sterling, as 'a provision for his children, and that at the first term of 'Whitsunday or Martinmas after my decease; with a fifth part 'more of the said principal sum of penalty in case of failure, 'and the due and ordinary annual rent of the said principal 'sum from the said term of payment until payment of the 'same; but in trust only, for behoof of the child or children to 'be procreated of any marriage into which he shall enter: Declaring, that the said Robert Gourlay shall, notwithstanding, 'have full power to convey the whole of the said sum of L.4000, 'hereby provided to his children of his first or any after marriage, to the exclusion of his other children, and to proportion 'the same among his said children as he shall think fit, and that 'either in his marriage-contract, or by any writing under his 'hand: And also declaring, that, in the event of the said Robert 'Gourlay surviving me, no part of the said principal sum shall 'be payable to any of the said child or children till the first 'term of Whitsunday or Martinmas after his death; and that he 'shall not be accountable to them for the interest thereof.'

May 11. 1824.

The bond was signed, not only by the father, but by Robert, who, by acceptance thereof, renounced the lease, and all claim for improvements on the lands of Pratis. The contract of marriage (to which the father was not a subscribing party) proceeded upon the narrative of the bond, which was fully recited; and in reliance upon it Robert bound himself to pay to his widow an annuity of L.150, and the sum of L.4000 to the children, all as provided by the bond, which he assigned, in security of the implement of his obligations, to trustees, who were nominated for carrying the same into effect.

At the date of the deeds, Oliver Gourlay, the father, was perfectly solvent, but thereafter he became bankrupt, and his estates having been sequestrated, Thomson was appointed trustee. Several children having been born of the marriage, a claim was made on their behalf, as creditors on the estate of their grandfather for the L.4000. This claim having been rejected, their father Robert, along with the trustees, presented a petition and complaint to the Court, praying to have Thomson ordained to rank the children as creditors. This was resisted, on the general ground that no *jus crediti*, but merely a *spes successionis* of a gratuitous nature, had been created by the bond, and therefore, that the children could not compete with onerous creditors.

May 11. 1824. The Court, however, by a narrow majority, found, ' that a *jus crediti* has been created in this case in favour of the grandchildren, so as to entitle them to compete with the onerous creditors of Oliver Gourlay; and therefore sustained the complaint, and remitted to the trustee, with instructions to admit the claim of the petitioners, on behalf of the children of Robert Gourlay, to be ranked on Oliver Gourlay's estate, in terms of the statute; and ordained the said Andrew Thomson, the trustee, to rank them accordingly; but found no expenses due:' and to this interlocutor they adhered on the 15th December 1820.\* Thomson, the trustee, then entered an appeal, and maintained,—

1. That it is a rule perfectly established in the law of Scotland, with regard to provisions in favour of children, whether contained in a marriage-contract or in a separate bond, that unless either principal or interest be made payable at a term which may arrive in the lifetime of the granter, the children are held to be only heirs of provision, whose right of credit extends no farther than to prevent the granter from disappointing the provision by gratuitous deeds, and consequently they are not allowed to compete with the granter's onerous creditors.

2. That although a contract of marriage is an onerous deed, and may give rise to a *jus crediti*, yet in this case the claim was not founded upon such a contract, but only upon a common bond of provision, payable after the death of the granter, which was a deed of a gratuitous nature, and could not vest the children with a *jus crediti*. And,

3. That although the bankrupt stood in the relation of grandfather to the children, yet he could not be regarded as a third party, but, on the contrary, in *loco parentis* to them; so that the principle of the cases which regulated the questions as between onerous creditors of a father and his children, must be here applied; and that that principle was, that bonds of provision were to be considered as merely giving a *spes successionis*; which rule was established in consequence of the jealousy of the law, and the facility which existed of a parent's conveying his effects to his own family.

On the other hand it was contended, that the children were entitled to be ranked,—

1. Because the provision in question was not only part of an onerous contract made between Oliver Gourlay and his son; but was granted in contemplation of the son's marriage, which was an

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\* Not reported.

onerous cause per se; and it was no less a part of the marriage-contract, by the reference which these two deeds bore to one another, than if both had been engrossed in the same deed. May 11. 1894.

2. Because this onerous obligation by Oliver Gourlay was conceived, not in favour of his own children nascituri, but of the children of his eldest son, who were neither the heirs nor executors of Oliver Gourlay, the granter, and could have no other meaning or effect than that of securing to these children a *jus crediti*.

3. Because the obligation was onerous quoad the children, not merely by their mother's marriage, which took place on the faith of the obligation itself, but likewise by the surrender of her property to Robert Gourlay, her husband; which property, but for Oliver Gourlay's provision, might have been reserved for them. And,

4. Because the *jus crediti* of the children was not only indicated, but effectually established and secured by the creation of a trust, for their use and benefit, in the person of their father, Robert Gourlay, who was not even invested with a positive right to the *liferent* of the property.

The House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.'

LORD GIFFORD.—My Lords, It is not usual for the person who has the honour to assist your Lordships' judicial deliberations, to assign the particular reasons upon which he founds his opinion, if that opinion goes to the affirmance of the judgment appealed from: and although, on the present occasion, I shall conclude with a proposition to that effect, yet there are in this case circumstances which induce me to trouble your Lordships with some observations. My Lords, the cause now before your Lordships turns upon the competency of creating, by means of family arrangements, such a right as shall authorize the holder to compete with the onerous creditors of a bankrupt. (Here his Lordship went shortly over the circumstances of the case.)—My Lords, many cases have been cited in the course of the pleadings, which go to establish the point, that children cannot come in competition with onerous creditors for provisions made to them by their parents.

My Lords,—It is the very farthest in the world from my intention, to call in question the soundness of the doctrine established by these cases. But my opinion, in the present case, is founded on this, that the transaction upon which the claim of these children is founded was an onerous contract,—a contract between their grandfather and their father, by which the former makes provision for his grand-children, while the latter surrenders a lease of great value, after having made



May 11. 1824. considerable improvements upon the farm. The surrender was, in fact, the price which the respondent paid for a provision to his children; and I therefore hold them as onerous creditors to that extent. My Lords, I am anxious to impress it upon the minds of your Lordships, that I hope I shall not be understood as giving any opinion upon the general question argued in the pleadings at the Bar; and it was chiefly with a view to guard myself against any such supposition, that I wished to address to your Lordships even the few observations which I now take the liberty to offer. My Lords, I observe there was a considerable difference of opinion among the Judges in the Court below; but a majority were for sustaining the claim of the respondents; and upon the best consideration which I have been able to bestow upon this cause, I am satisfied that they have arrived at the right conclusion, and that the interlocutor appealed from ought to be affirmed. My Lords, while such is my opinion upon the merits of this cause, yet, considering the nicety of the case, and the great diversity of opinion which appeared among the Judges by whom it was decided in the Court of Session, I think the appellant, acting for a body of creditors, was justified in submitting the question to the judgment of this House, and that there is no room for awarding costs. All, therefore, that I mean to propose is, simply, that the interlocutors complained of in this case be affirmed.

*Appellants' Authorities.*—1. Bank. 5. 17.; 3. Ersk. 8. 39.; Graham, Jan. 24. 1677; (12,867.); Marjoribanks, Feb. 26. 1682, (12,891.); Strahan, July 21. 1754, (996.); 1. Bell, 554.; Lang, Feb. 1. 1820; F. C.

*Respondents' Authorities.*—1. Bell, 200. and cases there quoted.

J. RICHARDSON—J. CHALMER,—Solicitors.

(Ap. Ca. No. 38.)

No. 27. JOHN M'CALL and Company, Appellants.—*Warren—  
Buchanan.*

JAMES BLACK and Company, Respondents.—*Shadwell—  
Stephen.*

*Retention—Lien—Execution pending Appeal.*—A party having been employed as a mercantile agent, to purchase and ship goods for a Company, on which he made large advances; and having by their orders purchased other goods as their broker, and of which he obtained possession, but on which he did not make any advances; and it having been afterwards disclosed that these latter goods formed part of a joint adventure, in which the Company and others were concerned;—Held in a compe-

tion with the creditors of the joint adventure, (qualifying the judgment of the Court of Session), 1. That the agent had no lien over these goods for security and payment of the general balance due to him, and arising out of the transactions with the Company: And, 2. (affirming the judgment), That the agent was bound, in a multiple-pounding relative to the price of these goods, and after the claim of lien had been rejected, to consign the whole proceeds, although one of his competitors had drawn dividends to an extent which considerably diminished his debt,—there being other claimants on the fund. May 18. 1824.

JOHN M'CALL and Company, merchants and commission agents in Glasgow, had been occasionally employed in the latter capacity by Thomson, Gibson and Company, general merchants in Leith. Towards the end of 1813, and when, in consequence of the political changes which were then taking place upon the Continent, great expectations were entertained of a most lucrative market being opened for colonial produce, Thomson, Gibson and Company, entered into a speculation with William Tennant, merchant in Edinburgh, to purchase sugar and coffee, and export them to Holland. With that view they employed the appellants, M'Call and Company, to act as their agents, and in doing so it was arranged that they were to be paid upon the following footing:— May 18. 1824.  
2d Division.  
Lord Pitmilley.

‘ To be allowed for purchasing, selling, accepting, and del credere, 3 per cent.

‘ Purchasing, selling, and del credere, 2 per cent.

‘ Purchasing and accepting, 2 per cent.

‘ If you merely purchase, the common brokerage to be allowed.’

In consequence of this agreement, transactions to a large extent took place, and a balance, to the amount of upwards of L. 50,000, arose in favour of M'Call and Company, chiefly from advances on goods purchased by them.

In April 1814, by which time the ports of France had been opened to the importation of British goods, Thomson, Gibson and Company, and William Tennant, entered into a joint adventure with Gibson and Duncan, merchants in Leith, to purchase colonial produce, and export to France. About the same time, Black and Company, the respondents, had imported into the Clyde a cargo of 616 boxes of sugar, which were placed in bonded cellars at Greenock, in their own names. Under the instructions of Gibson, Thomson and Company, and so far as appeared without being made aware that Gibson and Duncan had any interest in the adventure, M'Call and Company purchased 800 of these boxes, for which they granted their own acceptances to Black and Company. A few days thereafter one of the part-

May 18. 1824.   ners of Thomson, Gibson and Company, came to Glasgow, and entered into a communing with Black and Company for the purchase of the remaining 316 boxes, at which he was assisted by one of the partners of M'Call and Company; but it was disputed whether the purchase was concluded by the partner of Thomson, Gibson and Company, or by that of M'Call and Company. It was, however, admitted, that for the price of these 316 boxes, being L.8055. 10s., Thomson, Gibson and Company granted their own acceptances, and that M'Call and Company did not come under any advance in relation to them; and accordingly, in subsequently rendering their accounts, they merely charged the common brokerage of 1 per cent.

Part of the first parcel, consisting of the 300 boxes, was shipped by M'Call and Company to France, and the bill of lading stated that this had been done by Thomson, Gibson and Company, and that the goods were to be delivered to Archibald Duncan, who was one of the partners of Gibson and Duncan. For relief of their engagements on account of this parcel, M'Call and Company obtained securities from Thomson, Gibson and Company, and Tennant, but they were still their creditors for upwards of L.50,000. Orders were then given by Thomson, Gibson and Company, (but still without any mention being made of Gibson and Duncan), to ship the parcel of 316 boxes to France. In the meanwhile M'Call and Company had obtained from Black and Company an order of delivery in their own favour on the keeper of the bonded warehouse for this parcel, and when they received orders to ship them, they intimated to Thomson, Gibson and Company, that it would be necessary, in the first place, to make some provision for the large balance which was due to them. After some correspondence on this subject, it was found that the French market was not favourable for the goods, and Thomson, Gibson and Company therefore gave orders to M'Call and Company to send them to Hamburgh. M'Call and Company, in consequence, engaged a vessel for that port; but having become suspicious of the circumstances of Thomson, Gibson and Company, they intimated the order of delivery in their own favour, on the 16th of May, to the keepers of the bonded warehouse, and directed them to take the bill of lading in the name of M'Call and Company, and to make the goods deliverable to their order. This was accordingly done, but no notice of it was given to Thomson, Gibson and Company; and the shipment appeared, from the Clyde list, to have been made by the keepers of the bonded warehouse.

May 18. 1824.

On the 31st of May, Thomson, Gibson and Company, and Tennant, became insolvent; and M'Call and Company then transmitted the bill of lading to their agents at Hamburgh, with instructions to hold the 316 boxes on their account. By an arrangement among the creditors of Thomson, Gibson and Company, and Tennant, it was agreed, that the affairs should be wound up under a voluntary trust, and that all questions of preference should be decided as if a sequestration under the Bankrupt Act had been issued on the 23d of May. Thereafter the interest of Gibson and Duncan in the adventure having been disclosed, the respondents, Black and Company, brought an action against them for payment of the *first* parcel of sugars, on the footing of being partners in the adventure, in which they obtained decree, and succeeded in recovering the amount. On the same footing, and after Gibson and Duncan had also become bankrupt, Black and Company brought an action against them, and also against Thomson, Gibson and Company, and Tennant, for payment of the price of the 316 boxes, in which they obtained decree. On the dependence of this action, they raised and executed letters of arrestment in the hands of M'Call and Company, for the purpose of attaching the proceeds of the 316 boxes which had been sold at Hamburgh; and certain other creditors of the joint adventure also arrested. A multiplepointing was then brought in name of M'Call and Company, in which appearance was made by Black and Company, and A. Newbigging, as trustee for M'Gowns, Watson and Company, and by other creditors of the joint adventure. By M'Call and Company it was contended, that as they had been employed in the capacity of mercantile factors by Thomson, Gibson and Company, and Tennant, to purchase these and other goods, and were their creditors to a large amount; and as the goods in question had come into their possession in the course of their employment in that character, they had a lien over them for security and payment of their general balance. To this it was answered by Black and Company, that M'Call and Company were not creditors of the joint adventure, but only of Thomson, Gibson and Company, and Tennant; that they had not been employed as proper factors to purchase the goods, but only as brokers; that they had not come under any advance on the faith of, or at least in relation to, these goods; and therefore, although it might be true that the existence of the joint adventure was not communicated to them, yet as, de facto, the goods did not belong to Thomson, Gibson and Company, and Tennant, but to another and different

May 18. 1894. party, viz. the joint adventurers,—M'Call and Company were not entitled to a lien over them for payment of a general balance due by Thomson, Gibson and Company, and Tennant.

The Lord Ordinary found, 'That the purchase of the sugars in question from Messrs Black and Company, whether it was made by Messrs M'Call and Company solely, or by Mr Archibald Gibson, through the medium of M'Call and Company, is proved to have been made for the behoof of the joint adventure undertaken by Messrs John Thomson, Gibson and Company, William Tennant, and Gibson and Duncan: That acceptances for the price of the sugars were granted by the purchasers, John Thomson, Gibson and Company, and that an order of delivery was granted by the sellers in favour of M'Call and Company: That it is not alleged that M'Call and Company made any advances to John Thomson, Gibson and Company, for whom they acted as brokers or agents, on the security of the particular purchase of sugars now in question; and that their claim of retention is founded entirely on their having been the factors of John Thomson, Gibson and Company, and on their having become, in the course of their dealings with that house, their creditors to a large amount: That although it has not been established by the other competing parties, that M'Call and Company, when they took the order for delivery, were in the knowledge of the fact, that the sugars belonged, not to the house of John Thomson, Gibson and Company solely, but to that Company as joint adventurers along with other parties; yet this fact being now established, M'Call and Company are not entitled to retain the price of the sugars in payment of their claims against John Thomson, Gibson and Company, but are accountable to the creditors of the joint adventure for the proceeds of the sugars, with interest from December 1814: and therefore found, That Messrs James Black and Company must be preferred, in virtue of their arrestments, over the fund in medio, to the extent of their debt still unpaid.'

M'Call and Company having reclaimed, and the Court considering it of importance to ascertain the facts in regard to the possession of the goods, their Lordships appointed condescendences, and granted diligence for recovery of documents; and after a hearing in presence, they adhered to the interlocutor complained of, and refused the petition. M'Call and Company again reclaimed, and contended, that they were entitled to have the facts decided by the verdict of a jury; but the Court, on the

20th of January 1821, refused the petition, and found them liable in expenses.\* May 18. 1824.

In the meanwhile, Black and Company had ranked upon the estate of Thomson, Gibson and Company, and Tennant, for the price of the goods, being L.8055, on which they drew a dividend of 10s. in the pound, amounting to L.4027. At the same time M'Call and Company had ranked for the general balance due to them, but under deduction of the proceeds of the goods, amounting to L.4880, and drew a dividend on the sum remaining after such deduction; so that in this way they did not draw a dividend on the L.4880, which would have given to them L.2440.

M'Call and Company having appealed, Black and Company, and the other arresting creditors, applied to the Court for interim execution, by ordering the proceeds of sugar to be consigned in bank till the issue of the appeal. This was resisted by M'Call and Company, who contended, that as Black and Company had already drawn a dividend on the original price, this sum ought to be deducted from the proceeds, and the balance only consigned. But the Court granted warrant for consignment of the whole proceeds; and against this order M'Call and Company also appealed.

On the merits of the case they contended,—

1. That as they had been employed by Thomson, Gibson and Company, and Tennant, in their professional character of mercantile factors, or commission agents, to buy, sell, and ship the goods forming the subject of their speculations; and as they had under this employment made large advances, they had a lien over all the goods which were put into their possession by these parties, for payment and relief of the general balance which was due to them on the account-current: That although it was true that they had not come under any advance in regard to the goods in question, yet, as they were led to believe that these belonged to their employers, and as on that faith they had incurred heavy obligations, and as an order of delivery had been granted to them by Black and Company, which they had duly intimated, whereby they had obtained legitimate possession, they were entitled to retain them till relieved of their balance.

2. That as this possession had been obtained bona fide, and as Thomson and Company, and Tennant, were the ostensible and

\* Not reported.

May 18. 1824. reputed owners, the appellants could not be affected by the concealed and subsequent emerging interest of Gibson and Duncan in the joint adventure.

3. That on the assumption of the existence of such an interest, still, as Thomson, Gibson and Company, and Tennant, were partners, possessing the full powers of the joint concern, it was competent for them to pledge the goods to any third party ignorant of their being partnership property; and in the absence of collusion or fraud, such a pledge was effectual so as to bind Gibson and Duncan. And,

4. That with regard to the order for interim execution, it was contrary to justice to ordain the appellants to consign the whole proceeds, without giving them credit for the dividends which had been drawn by Black and Company.

To this it was answered,—

1. That as Black and Company were creditors of a special partnership, consisting of Thomson, Gibson and Company, Tennant, and Gibson and Duncan; and as the goods which had been arrested formed part of the estate of that partnership; and as the appellants had not made any special advances on these goods, and merely alleged that they were creditors of another and a different party, they could not lawfully retain these goods in liquidation of their general balance.

2. That in relation to the sugars in question, the appellants were not employed, as proper mercantile factors, to incur obligations on the faith of them, but merely as brokers, to carry the purchase of them into effect, and ship them under the orders of their employers; in which latter capacity they could not claim a lien over the goods, on the footing of having made advances, in the course of other transactions, in the separate and different character of mercantile agents.

3. That the possession had been obtained under circumstances which deprived it of the character of being legitimate, whereby the foundation of the claim of lien was entirely removed. And,

4. That as it was admitted that the proceeds of the goods amounted to L.4880, and as it formed the fund in medio, the appellants were bound to consign.

The House of Lords found, ' That under the circumstances ' of this case, M'Call and Company had no lien upon the sugars ' in question for the general balance due to them from John ' Thomson, Gibson and Company, and William Tennant; and ' it is therefore ordered and adjudged, that the several interlocu-

'tors complained of be affirmed, without regard to the findings  
'in the said interlocutor of the Lord Ordinary of the 12th May  
'1818, and adhered to in the said subsequent interlocutors, with  
'respect to which the Lords do not find it necessary to give any  
'opinion.'

May 18. 1824.

And in the question relative to interim execution, their Lordships 'ordered, that the appeal be dismissed with L.100 costs.'

**LORD GIFFORD.**—My Lords, In a case in which John M'Call and Company, of Glasgow, are the appellants, and James Black and Company, of Glasgow, and Archibald Newbigging, trustee on the sequestrated estate of M'Gowns, Watson and Company, of Greenock, are the respondents, I will now address to your Lordships the observations which it occurs to me to offer to your Lordships upon this case.

My Lords,—The case arises out of certain transactions in business, which I will very shortly state to your Lordships. The respondents, James Black and Company, are merchants in Glasgow. The appellants are mercantile factors, or commission agents, in the same place, and in that character were employed by Messrs Thomson, Gibson and Company, merchants of Leith, in various commercial speculations; and it appears, from the correspondence which took place between those parties in the month of February 1814, that the terms on which Messrs M'Call and Company proposed to transact this business were as follows:—That they were to be allowed for purchasing, selling, accepting del credere, three per cent; purchasing, selling, and del credere, two per cent; purchasing and accepting, two per cent: it being understood, that if Thomson, Gibson and Company shipped the goods they were to buy, M'Call and Company were to value upon them at two or three months from the date their bills fell due; but that if they sold in Scotland, the bills for what they were under acceptance to be handed them. If Messrs M'Call and Company acted merely as agents to purchase goods, that is to say, if they were not to advance any money on account of those purchases, then they were to receive only the common brokerage. The stated accounts, afterwards rendered, stated the brokerage at one per cent.

On these terms these parties entered into very large transactions: purchases to a very large extent were made, and advances to a considerable extent undoubtedly were made by Messrs M'Call and Company.

My Lords,—In some of these speculations, a gentleman of the name of Tennant was concerned; and it also appeared, that, with respect to some of the transactions, particularly the transactions with respect to some sugars, other parties were also interested in those transactions together with Tennant. In the view I have taken of this case, after the best consideration that I have been able to apply to it, although it



May 18. 1824. does not appear to me that it is very important for your Lordships to attend particularly to the various persons concerned in those respective speculations, yet I should state to your Lordships, that in the month of April 1824, purchases of sugar to a very large extent were made on behalf of these gentlemen, Thomson, Gibson and Company. In those purchases Mr Tennant was also interested, and also persons who carried on trade under the name of Gibson and Duncan. It should seem that, to M'Call and Company, the only persons known in these transactions were Thomson, Gibson and Company, and Mr Tennant. My Lords, two purchases were made, one of 300 hogsheads of sugar, and another from persons of the names of Black and Company, of 316 hogsheads of Havannah sugars, the amount of which purchases is very large—several thousand pounds:—It is not necessary to trouble your Lordships with the figures.

My Lords,—With respect to one of those purchases, namely, that of 300 hogsheads, they were purchased on behalf of those parties by M'Call and Company, and M'Call and Company appear to have advanced money to pay the seller: But with respect to the 316 boxes of sugar purchased shortly after the first, it appears by the correspondence which has been produced, that they were paid for by advances or by bills drawn by Thomson, Gibson and Company; and that with respect to those no part of the advance was made, or was to be made, by M'Call and Company.

My Lords,—That distinctly appears by letter written by M'Call and Company to Thomson, Gibson and Company, of the 19th of April 1814, in which they state,—‘ We notice your directions as to the different shipments as noted by your A. G., which we will attend to. By to-morrow's coach we will forward you average samples of the last purchase from Messrs Black and Company; and enclosed we hand you the invoice of them—amount, L.8065. 10s. for which you will settle with Messrs Black and Company by your acceptances—the invoice of the other parcel we will hand you in a post or two. We have settled for it. We will write to Greenock about those two vessels mentioned by Mr Tasker to you. We observe we are to ship 70 hogsheads refined sugar for Leghorn. We presume you are aware, that in the event of such shipments, no extension of the usual credit can be allowed, and that a cash remittance will be requisite. We mention this for your government, in case of your wishing to ship further of what we are under acceptance for.’ So that they here state, with respect to sugars for which they were under acceptance, that they hesitate with respect to shipping any portion of them without receiving from Messrs Thomson and Company remittances on account of those sugars. In answer to that, there is a letter from Thomson and Company, of the 20th April 1814, in which they notice what M'Call and Company say as to cash remittances ‘ for any part of such goods as we may have occasion to ship for which you are under acceptance;’ and they express their surprise, that, with respect to

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these, they should require any further remittances before the shipments were made; for they say, 'we understood that any goods you purchased, and came under acceptance for on our account, we were to have the complete controul over that, as an additional charge was made for your coming under such acceptances; that if we at any time were to ship a part, the same was to be settled for by our acceptances at three months; and that if we sold any part here, the bills of the purchasers were to be handed you, if required.' My Lords, I merely point out these passages in the correspondence to shew, that the parties themselves always appear to have made a distinction between the goods on which advances were made by M'Call and Company, and those where the purchases were paid for, or stipulated to be paid for, by Messrs Thomson, Gibson and Company. Some short time after those purchases, in the month of May or June of the same year, these parties not having profited by their speculations, Thomson, Gibson and Company appear to have fallen into difficulties. On that occasion, the 316 boxes of Havannah sugar, which were purchased in the manner I have stated to your Lordships, and that remained in a warehouse in the names of M'Call and Company, were directed to be shipped by Messrs M'Call and Company; and they beginning to suspect the solvency of their correspondents, shipped them in their own names; and after the failure of Thomson, Gibson and Company, which took place before the goods had arrived on the continent, these goods were sold in the names of M'Call and Company, and the proceeds applied to their account. And the question in this case, which has been argued at your Lordships' Bar, is this, Whether Messrs M'Call and Company, having undoubtedly in many transactions acted as factors for Thomson, Gibson and Company, in which case they made advances on the goods purchased, and had the power of sale and disposition, and in which character by the law of Scotland, (which in this respect is similar to the law of England), a factor has a lien upon goods in his possession, as factor, for the general balance due to him upon that account—the question, I say, is, whether they have a lien in respect of these goods? My Lords, in this case M'Call and Company say that they have a right to apply this law, with respect to a lien, not only to the goods which they had in their possession in their character of factors, but that those 316 boxes of sugar, on which they made no advance, upon which, as I have stated to your Lordships, a different rate of remuneration was to be paid them, they say we will apply to our account; and therefore we claim to retain the prices they have produced by their sale on the continent, and reduce the account of Messrs Thomson, Gibson and Company, which much exceeds the value of those goods.

My Lords,—In consequence of these claims, proceedings have been had in the Courts below. Messrs Black and Company, who were the sellers of these goods, instituted proceedings against the parties on whose behalf they were purchased, and who were concerned in this

May 18. 1824. speculation. And it is stated, that, upon the dependence of this action, the respondents sued out letters of arrestment against Gibson and Duncan, and they executed this writ in the hands of the appellants, pretending in this manner to attach the proceeds of the 316 boxes of Havannah sugar, upon the assumption that these belonged in whole or in part to Gibson and Duncan, or to the joint adventure. Other arrestments were, in like manner, used in the hands of the appellants by a different house, (the respondents, M'Gowns, Watson and Company), designing themselves creditors of Gibson and Duncan, and who say they had a right to sue out letters of arrestment against these goods, and by virtue of which they contend that they have a right to claim the proceeds of these sugars.

My Lords,—In consequence of this a process of multiplepoinding, as it is called in Scotland, was raised in the name of the appellants, in which the different claimants on the funds were called as parties, and which contained the ordinary conclusions for dividing it between them; and in that process, the case having come before Lord Pitmilley as Lord Ordinary, his Lordship, on the 12th of May 1818, pronounced an interlocutor, the first appealed from in this case, by which it is found, that the purchase of the sugars in question from Messrs Black and Company, whether it was by Messrs M'Call and Company solely, or by Archibald Gibson through the medium of M'Call and Company, is proved to have been made for the behoof of the joint adventure undertaken by Messrs John Thomson, Gibson and Company, William Tennant, and Gibson and Duncan. Then he finds, that acceptances for the price of the sugars were granted by the purchasers, John Thomson, Gibson and Company, and that an order for delivery was granted by the sellers in favour of M'Call and Company: that it is not alleged that M'Call and Company made any advances to John Thomson, Gibson and Company, for whom they acted as brokers or agents, on the security of the particular purchase of sugars now in question; and that their claim of retention is founded entirely on their having been the factors of John Thomson, Gibson and Company, and of their having become, in the course of their dealings with that house, their creditors to a large amount. Then he finds, that although it had not been established by the other competing parties that M'Call and Company, when they took the order for delivery, were in the knowledge of the fact that the sugars belonged not to the house of John Thomson, Gibson and Company, solely, but to that Company as joint adventurers along with other parties, yet that fact being now established, M'Call and Company are not entitled to retain the price of the sugars in payment of their claims against John Thomson, Gibson and Company, but are accountable to the creditors of the joint adventure for the proceeds of the sugars, with interest from December 1814. Then he finds, 'that Messrs James Black and Company must be preferred, in virtue of their arrestments, over the fund in medio, to the extent of their debt still unpaid; and appoints parties to debate on

' the other points of the case which are not fully stated and argued in May 18. 1824  
' the memorials.'

My Lords,—That interlocutor was brought under the review of the Lord Ordinary; but, on the 20th of May, he pronounced another interlocutor, by which he ' prefers the claimants, Messrs James Black and Company, upon the fund in medio, in virtue of their arrestments, ' to the extent of their debt still unpaid; and decerns in the preference ' and against the raisers of the multiplepounding for payment accordingly.' The Court of Session was then petitioned against these judgments; but, on the 22d of June 1820, that Court, having heard Counsel, pronounced an interlocutor, by which they ' adhere to the interlocutor complained of, and refuse the desire of the petition; find ' the petitioners liable in expenses; and remit to the auditor to report ' on the account thereof when lodged.' My Lords, a reclaiming petition was afterwards presented to the Court of Session; but, on the 20th of January 1821, the Court pronounced an interlocutor, by which they still adhered to the interlocutor complained of. The case was then returned to the Lord Ordinary, as it was necessary, in point of form, that, in applying the previous judgments, his Lordship should prefer the trustee upon M'Gowns, Watson and Company's estate, upon the fund in medio secundo loco; and on the 25th of January 1821, his Lordship pronounced the interlocutor which I will read to your Lordships. ' The Lord Ordinary having heard the Counsel for the claimant, Archibald Newbigging, trustee on the sequestrated estate of ' M'Gowns, Watson and Company, prefers the said Archibald Newbigging, as trustee sforesaid, for ought yet seen, in virtue of his interest produced, secundo loco upon the funds in medio, for payment ' to him of the sum therein contained; and decerns in the preference ' and against the raisers of the multiplepounding for payment accordingly, and dispenses with any representation against this interlocutor.' Against this interlocutor the appellant reclaimed to the Court by a petition, which was refused by the following interlocutor: ' The Lords ' having heard this petition, they adhere to the interlocutor reclaimed ' against, and refuse the desire of the petition.'

My Lords,—The result of this interlocutor is this, that the Lord Ordinary in the first place, and the Court of Session in the second, have decided, that M'Call and Company have no right to retain the proceeds of these goods in liquidation of their balance; but that Black and Company, who were the sellers to Gibson, Thomson and Company, have a right, in the first place, to the proceeds, in liquidation of the debts due to them in respect of those various goods; and that if there should be more than enough to satisfy their demand, Archibald Newbigging, trustee for M'Gowns and Company, who were also creditors of Thomson, Gibson and Company, has a right, in the second place, to the produce of those funds.

I should have stated to your Lordships, that, besides the correspondence which I have taken the liberty of calling your Lordships' attention to, an account-current was produced in the Court below, between

May 18. 1824. Thomson, Gibson and Company, and William Tennant; and John M'Call and Company, with the charge of mere brokerage or commission of one per cent on the 316 boxes of sugar—the stipulated remuneration where they merely purchased, and where they made no advances; but where they acted as factors, and made advances, then they charged in their account-current the three per cent commission to which they were undoubtedly entitled under the agreement which had been made on their commencing those transactions with Thomson, Gibson and Company.

My Lords,—When this case was argued at your Lordships' Bar, I took the liberty of asking the Counsel for the appellants, whether any case could be produced in the law of Scotland, or the law of England, in which it had been determined, that where a man united in himself the character of a factor, and some other character in which he had no right to a general lien, he could, in respect of goods in his possession, over which he had no controul in his second character, apply his right in the first as factor, and retain the goods which came into his hands in the second character for his right in the first? It was admitted that no such case could be produced; and since this case has been argued before your Lordships, I have, with as much diligence as I have been able, examined these cases, and none such can I find in the law of England or the law of Scotland. Indeed in the law of England (and I presume it is the same in Scotland) there is a maxim, that when a man unites two characters, where they are applied to any right, he is to be considered as if they were in different persons; and that appears to be the common-sense rule to be applied in such cases. Now in this case it is quite clear, that M'Call and Company never had these goods in their possession as factors: they made no advances upon those goods; on the contrary, they distinctly declined making any advances. It appears from the correspondence I have stated to your Lordships, they merely charged the common brokerage; and it is clear the goods were deposited in their warehouse in their name, that they might take their measures when it became necessary to ship them. But I cannot help observing, that their authority to ship was an authority to ship in the names of Thomson, Gibson and Company; and it was concealed from Thomson, Gibson and Company, till after the shipments had been made, that the shipments had not been made in their names, and that they had not complete controul over them by the bills of lading: that was a contrivance on the part of M'Call and Company, I do not say an improper one under those failing circumstances of Thomson, Gibson and Company, to preserve to themselves a controul over those sugars on their being landed on the continent, and to enable them to lay their hands upon them, if Thomson, Gibson and Company were disabled from paying them their balance. And some little anxiety was shewn by M'Call and Company to prevent their appearing in the Clyde list, as shipped in their own names; and if it had been necessary to examine that part of the case, it might have become a very material part of the case, whether, under the circumstances of the shipment,



May 18. 1824.

they had a right to lay their hands on the proceeds, or whether the possession of the goods was not taken out of them, so as to disable them from applying their character of factors to those goods. But as in the short view of this case which I have taken, it appears to me clear they have no right to apply their character of factors, and claim a right of general lien to the proceeds of these goods, it is unnecessary to trouble your Lordships with observations upon that part of the case. The result, therefore, of the best view I have been able to give to the case is, that these interlocutors deciding that M'Call and Company have no general lien, are right; but at the same time there is so much speciality in the findings of the Lord Ordinary, that perhaps in some of those findings I might find a difficulty in concurring. The result of my opinion would go to the affirmance of those interlocutors; but, undoubtedly, the judgment which should be framed by your Lordships will require some speciality in it; and therefore, with your Lordships' permission, I will not move for judgment to-day in this case; but I will, on the next day I have the honour of attending your Lordships, propose for your adoption the form of a judgment, embodying in it the short view I have taken of it, namely, that under these circumstances the parties have no right to the general lien. The result will be the affirmance of the interlocutors, but not adopting, perhaps, all the special findings of the Lord Ordinary. It appears that the judgment of the Court of Session finally did not proceed on all those specialities, though the general form has been affirmed by the subsequent judgment of the Court of Session. With these observations, therefore, I shall now close what I have to state on this case, by requesting of your Lordships permission on Friday next, when I shall have the honour of attending your Lordships again, to propose the form in which I should humbly move your Lordships would, in this case, affirm the interlocutors, with the grounds on which the finding should be made.

*Appellants' Authorities.*—Kinloch, 3. Durn. and East, 119. and 783; Ellis, 3. Durn. and East, 468; Wright, 4. East, 82; 1. Campbell, 452; Harman, 2. Campbell, 243; 15. East, 21.; 2. Barn. and Ald. 131.; Ambler, 252; 1. Alth. 228. 237.; 2. Vesey, 674.; 2. Burr. 937.; 1. Blackst. Rep. 652.; 4. Burr. 2221.; Cowp. 251.; 6. Durn. and East, 632.; 3. Bos. and Pull. 498.; 1. East, 335.; 2. Campbell, 218. 597.; 4. Campbell, 60. 349.; Paley, 253.; 7. Durn. and East, 361.; Cullen's Bankrupt Law, 206. N. 71.; 7. East, 210.; 8. Vesey, jun. 542.

*Respondents' Authorities.*—1. Atk. 228.; 1. Stair, 18. 7.; 3. Ersk. 4. 21.; Chalmers, June 30. 1666, (9137.); 4. Burr. 221.; Harper's Creditors, July 27. 1791, (Bell's Cases, 440.); 2. Vernon, 217.; 4. Burr. 2218.; 1. Gow, 132.; Colquhoun, Nov. 15. 1816, (F. C.); Ede and Bond, May 15. 1818, (F. C.); Johnston and Manly, Feb. 13. 1818, (F. C.); Johnston, Nov. 18. 1818, (F. C.); 3. P. Williams, 185.; 5. T. R. 226.; 3. Maule and Selw. 573.; 1. Price, 116.

J. CAMPBELL—J. RICHARDSON,—Solicitors.

(*Ap. Ca. 39. and 41.*)

No. 28. Mrs ISOBEL LITTLE or MURRAY, and Husband, and MARGARET LITTLE, Appellants.—*Shadwell—Stephen.*

JAMES and JOHN LITTLE, Respondents.—*Warren.*

*Clause.—Construction of a clause of a deed of settlement.*

May 20, 1824.

2D DIVISION.  
Lord Pitmilly.

THE late James Little, writer to the signet, had two natural sons, the respondents, by Elizabeth Kinnaird; a brother John; and two sisters, Margaret (who was unmarried), and Isobel, wife of William Murray, agent for the Church of Scotland. In 1810 Mr Little executed a trust-deed, by which he conveyed his whole effects to Thomas Cranstoun, Esq. writer to the signet, and others; and after declaring that the first purpose was for payment of his debt, he expressed the second and third objects in these terms:—‘ I appoint my said trustees to pay L.25 sterling ‘ annually towards the maintenance and education of my two ‘ natural sons, James and John, whom I had by Elizabeth Kinnaird, until they severally arrive at the age of 21 years, at which ‘ periods, if my said trustees shall be of opinion that these two ‘ boys, or either of them, are deserving, and likely to do well, ‘ then I appoint my said trustees to pay to them, in such proportion as they may think proper, the sum of L.400 sterling, to ‘ enable the said two children, or either of them, to commence ‘ business; and if either die, my said trustees may, if they shall ‘ think proper, give the whole to the survivor. But if it shall ‘ be the opinion of my said trustees, that both or either of these ‘ boys are not by their conduct deserving of what I have intended ‘ for them, then they shall draw nothing whatever out of my ‘ said trust-estate.’

‘ *Tertio*, I appoint my said trustees, under the power herein ‘ after vested in them, to give to the said Elizabeth Kinnaird, ‘ daughter of the deceased Kinnaird, teacher at Saint ‘ Madoes, not only the life-rent use and enjoyment of my said ‘ two houses or flats in Robertson’s Court or Close, but my said ‘ trustees shall also pay to the said Elizabeth Kinnaird, in case ‘ she survive me, an annuity of L.15 sterling, in consideration of ‘ her fidelity and respect to me, and that at two terms in the ‘ year, Whitsunday and Martinmas,’ &c. The fourth and fifth provisions related to special legacies, of no importance to the present question; and he then proceeded to declare the further objects of the trust to be as follows:—‘ *Sexto*, After all the above ‘ purposes are answered, and such other legacies or provisions

‘ as I may hereafter leave likewise paid and provided for, my May 20. 1824.  
 ‘ said trustees shall divide the *free* residue of my estate and effects  
 ‘ equally among my brother and sisters, John Little, merchant  
 ‘ in Edinburgh, Margaret Little, presently residing in family with  
 ‘ my said brother in Edinburgh, and Isobel Little, spouse of  
 ‘ William Murray, agent for the Church of Scotland; or among  
 ‘ such of them as may survive me. But it is hereby specially  
 ‘ provided and declared, that the share, or the whole, as the case  
 ‘ may happen, that shall be allocated to my said brother, John  
 ‘ Little, shall not be paid to him; but such capital or residue  
 ‘ shall be lent out by my said trustees, in their own names, and  
 ‘ the interest arising therefrom shall only be paid to the said  
 ‘ John Little, during all the days of his life, by way of annuity;  
 ‘ which annuity I hereby declare to be purely alimentary, and  
 ‘ not to be adjudgeable or arrestable by creditors, or affectable  
 ‘ by the acts or deeds of the said John Little. And at the death  
 ‘ of the said John Little, the capital set apart to answer the fore-  
 ‘ said annuity, shall be divided equally betwixt my said two  
 ‘ sisters, or the survivor of them shall draw the whole. *Lastly,*  
 ‘ In the event of both of my said sisters predeceasing me, or at  
 ‘ the death of the said John Little, in the event of his suc-  
 ‘ ceeding to the whole free residue, then I appoint such free  
 ‘ residue to be divided equally among the children, male or  
 ‘ female, procreated of the marriage betwixt Walter Greig,  
 ‘ builder in Edinburgh, and Rebecca Sharp, his present spouse;  
 ‘ that is to say, among such of these children as may happen to  
 ‘ be in life when such residue falls to that family; and if any of  
 ‘ these children die, leaving issue, then such issue shall draw  
 ‘ equally the share which would have been allocated to the child  
 ‘ or children so predeceasing.’ The deed reserves the grantor’s  
 ‘ liferent, and full power to alter, revoke, innovate, &c.

Thereafter, in 1811, he executed a codicil in these terms:—  
 ‘ In respect that since the date of the within deed I have, in con-  
 ‘ sideration of a certain sum paid to me by the within named  
 ‘ Margaret Little, granted her a bond of annuity for L.100  
 ‘ sterling, therefore I hereby revoke and recall the whole provi-  
 ‘ sions in favour of the said Margaret Little contained in the  
 ‘ within deed, and hereby declare that she is to derive no benefit  
 ‘ whatever from the reversion of my trust-estate, the bond of  
 ‘ annuity which I have granted to her being, in existing circum-  
 ‘ stances, amply sufficient for her support; and, with this altera-  
 ‘ tion, I approve of and hereby homologate the within deed.’  
 In 1814 he executed a second codicil, which was thus expressed:



May 20. 1834. —‘ I hereby revoke and recall the appropriation of the residue  
‘ of my estate; and appoint my trustees to divide the same  
‘ equally betwixt my said two sons, James and John, and in the  
‘ event of either of them dying without lawful issue, the survivor  
‘ shall be entitled to draw the whole; and till said succe-  
‘ sion opens to them, I appoint my said trustees to apply annually  
‘ towards their maintenance and education such sum as they may  
‘ think proper, not exceeding L. 100 sterling per annum; and as  
‘ I have now sold the house in Robertson’s Court, I appoint my  
‘ said trustees, under the provision and declaration within men-  
‘ tioned, to pay to the said Elizabeth Kinnaird a free yearly  
‘ annuity of L. 25 sterling.’

In September 1816 Mr Little died without lawful issue, and a question then arose between his two natural sons, (who were in pupillarity, and to whom a tutor ad litem was appointed), and his sister Mrs Murray, and his brother John Little, as to their respective interests under the trust-deed and relative codicils.

A multiplepounding was then brought by the trustees, in which claims were made by each of these parties, and appearance was also entered by Margaret Little, who did not allege that she had any claim under the deed of settlement, but stated that she was a creditor of the defunct for L. 1700.

On the part of Mrs Murray it was contended, that, under the trust-deed, the defunct had made reference to a ‘ free residue ’ in two different senses; the one relating to the free residue of his whole effects, and which, in the event of being survived by his brother and two sisters, was to be divisible into three equal parts, of one of which his brother was to enjoy the liferent, and his sisters were to have right to the fee of the whole under that burden; and the other sense in which he had employed the term had reference to the event of the two sisters predeceasing him, and of his brother John surviving him, and so acquiring right to the free residue, in which case he appointed it to be divided among the family of Walter Greig: That by the first of the codicils, he had deprived his sister Margaret of any share of the estate; and by the second, he had substituted his natural children in the place of the Greigs; but that he never intended that, in the event of being survived by his sister, his natural children should have right to the free residue—his intention being that they should come into the place of the Greigs, in case she predeceased him, an event which had not occurred; and therefore she was entitled to the whole of the free residue, subject to the burden of paying the interest of one-half thereof to her brother John.

On the part of John, the same construction was contended for, to the effect of entitling him to draw the interest of one-half of the free residue; and he maintained, that, even if the natural children should be found entitled to the free residue, they could only take it under that burden. May 20. 1824.

On the part of the children it was contended, that as, by the last codicil, the defunct had expressly revoked the appropriation of the free residue of his estate in general and unlimited terms, it was impossible to restrict it in the manner alleged by their opponents, and that the effect of that revocation was, to set aside the whole trust-deed in so far as it related to a disposition of the free residue, and to annex the codicil in place thereof; so that they were entitled to draw the whole free residue.

The Lord Ordinary pronounced this interlocutor:—‘ In respect the trust-disposition of the 21st of April 1810, makes twice mention of the free residue of the testator’s estate, declaring, when the free residue is first mentioned, that after the purposes of the trust are answered, the trustees shall divide the free residue among the testator’s brother and sisters, and thus having in view the succession which is to open on the death of the testator; but declaring, when the free residue is mentioned the second time, that it shall be that share of the estate which, in certain events, is to be set apart for providing an annuity for John Little, one of the testator’s brothers, and is, after the death of John Little, to be divided among the children of Walter Greig and Rebecca Sharp; and thus having in view the free residue, not at the death of the testator, but at the death of the testator’s brother, John Little; and in respect of the clause of the codicil of 8th September 1814, founded on by the claimants, James and John Little, the testator’s natural children, in which the free residue is provided to them; but it is declared, that “ until said succession opens to them,” the trustees may employ a certain sum annually, not exceeding L.100, in their maintenance and education: finds, That the free residue mentioned in the codicil means the free residue which was eventually to arise at the death of the testator’s brother, John Little, in manner before mentioned, and not the free residue at the testator’s death, the succession to which opened on that event: On these grounds, repels the claim of the said James and John Little to the fund in medio, and prefers the claimants Isobel Little or Murray, and John Little, upon their claims to the free residue in question.’

Against this judgment the natural children reclaimed, and

May 20. 1824. the Lord Justice-Clerk being absent from indisposition, and the other four Judges being equally divided in opinion, Lord Pitmilley was called in, and their Lordships thereupon adhered to the interlocutor, 'reserving to the petitioners to be farther heard before the Lord Ordinary on their claim to such sum as the trustees shall think proper to apply annually towards their maintenance and education, not exceeding L. 100 sterling per annum.'

Having again reclaimed, the Court, on considering the petition, with answers, 'and whole circumstances of the case, found the petitioners entitled to the residue of the estate in question, and in so far altered the interlocutors complained of; but remitted to the Lord Ordinary to hear the respondent, John Little, farther upon his claim to an annuity payable to him as a burden on the said residue.' And to this judgment their Lordships adhered on the 19th of January 1820.\*

Mrs Murray then appealed; but no appeal was entered by John Little. When, however, the case came to be heard, it appeared to the House of Lords that John Little ought to have been a party to the appeal, and that as he was now dead, his representative ought to be called in his place. In consequence of this, the further hearing was adjourned, and his sister Margaret having obtained herself decerned executrix-dative of John, she presented a petition, praying that she might be admitted as an appellant; and this having been granted, their Lordships, after hearing the appellants, on the motion of the Lord Chancellor, 'ordered and adjudged, that the appeal be dismissed; and the interlocutors complained of affirmed.'

SPOTTISWOODE and ROBERTSON—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No. 40.*)

No. 29. HECTOR F. M'NEILL, Appellant.—*Warren—Abercromby.*

WALTER MOIR and Others, Trustees of the late Dr M'NEILL, Respondents.—*Keay—Brougham.*

*Facility—Fraud.*—Circumstances under which (affirming the judgment of the Court of Session) a deed was set aside, which had been obtained from a facile person,

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\* Not reported.

nearly 80 years of age, whereby he discharged a debt of L. 3000, heritably secured, for a bill of L. 230, and an annuity of  $7\frac{1}{2}$  per cent during his life, for payment of which no security was granted.

IN 1787, Dr M'Neill lent L. 1000 to Daniel M'Neill of Gallochilly, (the father of the appellant), for which an heritable bond was granted, on which Dr M'Neill was infest; and besides this sum, there was also due to Dr M'Neill a debt of L. 600, with interest.

May 21. 1824.

1st Division.  
Lord Alloway.

On the death of his father and an elder brother, the appellant, Hector Frederick M'Neill, succeeded to the estate, subject to these burdens; and it appeared, from a state of debt made up in February 1806, that the sum due to Dr M'Neill then amounted to L. 2516. This sum, it was alleged, Dr M'Neill at the same time restricted to L. 2136, by a holograph writing, but it was not signed by him. The only payment which was subsequently made by the appellant was L. 100. In December 1811 he came to Edinburgh, where Dr M'Neill then was, and had a meeting with him on the subject of the debt. At this time, Dr M'Neill was nearly 80 years old, and the infirmities of age had been considerably increased by a habit of indulging in spirituous liquors. His affairs were managed by Mr Jaffrey, writer to the signet, and he was in the habit of consulting Mr Walter Moir, accountant, and David Bridges, merchant in Edinburgh. The above meeting took place on the 24th of December, at the Turff Coffee-house, where the appellant resided, and no other person was present except the parties themselves. A missive of agreement, in the form of a letter, addressed by Dr M'Neill to the appellant, was then drawn out by the latter, which was expressed in these terms:—'Edinburgh, 24th December 1811. 'SIR,—As you have this day given me your bill for L. 230 'sterling, I bind myself to give you credit for the same in my 'account; and I farther bind and oblige myself, in consequence 'of this payment from you, to free you from all bonds and 'other claims that I may have against you, on condition that 'you grant me your bond of annuity, during my life, for a 'sum equal to the interest of the balance you owe me, after 'deducting this L. 230, at the rate of seven and a half per cent. '(Signed) JAMES M'NEILL. (Agreed) HECTOR F. M'NEILL.'

Subjoined to this, Dr M'Neill added the words:—'To be 'adjusted with Mr Walter Moir's approbation.'

On the following day, being the 25th, another meeting took place at the Turff Coffee-house, on which occasion a Mr Galbraith

May 21. 1824. was present, who, it was alleged, was the agent of the appellant; and, on that occasion, a letter, regularly tested, was written by that person, in these terms:—‘Edinburgh, 25th December 1811.  
 ‘SIR,—As you have this day given me your bill for L.230  
 ‘Sterling, I bind myself to give you credit for the same in my  
 ‘account; and I farther bind and oblige myself, in consequence  
 ‘of this payment from you, to free you from all bonds and other  
 ‘claims that I may have against you, on condition that you grant  
 ‘me your bond of annuity, during my life, for a sum equal to  
 ‘the balance you owe me, after deducting this L.230, at the rate  
 ‘of seven per cent. In witness whereof, I have subscribed these  
 ‘presents, (written by David Stewart Galbraith, factor upon the  
 ‘estate of Largie), at Edinburgh, the 25th day of December  
 ‘1811 years, before these witnesses, the said David Stewart Gal-  
 ‘braith, and Alexander M'Donald, waiter in the Turff Coffee-  
 ‘house, Edinburgh. (Signed) JAMES M'NEILL.  
 ‘D. Stewart Galbraith, witness; Alexander M'Donald, witness.  
 ‘To Hector F. M'Neill, Esq. of Gallochilly.’

At this time the debt due to Dr M'Neill amounted to nearly L. 3000, and no duplicate of the missive was given to him. At these meetings it was alleged by the respondents, that gin had been brought in and given to Dr M'Neill. On the same day he called on Mr Moir, and mentioned the circumstance of the missive to him, and that gentleman, in a letter which he wrote to Mr Kennedy, (who was the regular law agent of the appellant), in relation to a state of the debt which he wished to see, stated, —‘That the Doctor has been just mentioning to me something  
 ‘of an arrangement to be gone into by Gallochilly and him,  
 ‘the meaning or effect of which he does not seem to have any  
 ‘idea of. He wished me to assist him in this arrangement with  
 ‘Gallochilly; but so far as I can comprehend it, it appears to  
 ‘me to be of such a nature, that I felt it my duty to inform him,  
 ‘that I declined having any thing to do with it. I am,’ &c.

And on the following day, in answer to a similar request by the appellant, Mr Moir wrote to him, that ‘you misunderstood one  
 ‘another very much, I suspect, as to the terms of your pro-  
 ‘posed settlement.’

On the 27th, Mr Moir again wrote to the appellant, in reference to a meeting which had taken place at his house, that  
 ‘at a meeting of some of the Doctor's friends to-day, relative to  
 ‘the state of matters betwixt him and you, he insisted positively,  
 ‘as he did in your own presence at my house, that it never  
 ‘was his intention to sink the balance of the debt, as stated in

' the memorandum, and that he did not understand it to have  
' such a meaning. Indeed, he was quite out of temper when it  
' was mentioned to him that such was the construction of the  
' writing;—that he thought the capital was to be at his disposal;  
' but he was not to have the power of calling it up during his  
' life, unless you chose to pay it on the principle of a redeema-  
' ble annuity, of which, however, he seems to have a very con-  
' fused notion.'

May 21. 1894.

In answer to this letter, the appellant stated, that he was perfectly aware that a great advantage had been conferred upon him; but that it was the intention of the Doctor to do so, and that he had expressly said so on the occasion alluded to in Mr Moir's letter. This letter from the appellant, it was said, had never been received; and as he was about to leave town, Messrs Moir and Bridges, acting on behalf of Dr M'Neill, executed a protest against the appellant, in which they stated, that it was never the intention of Dr M'Neill to enter into a transaction, whereby to discharge a debt of L. 3000 upon the terms contained in the missive, but that, on the contrary, he had been purchasing a perpetual annuity.

The appellant having afterwards brought an action for implement, Dr M'Neill assigned the debt in trust to the respondents, Messrs Moir and Bridges, who raised an action of reduction, on the ground that the ' said missive was obtained from the said  
' Dr James M'Neill by the defender, through extreme facility on  
' the part of the granter, on an understanding of the transaction by  
' him totally different from that which is pretended to be borne  
' out by the words of the said missive, without any onerous or  
' just cause, and to the granter's great hurt and prejudice, and  
' enormous lesion.' The Lord Ordinary, after conjoining the two processes, pronounced this interlocutor:—' In the said process of reduction, finds it asserted upon the part of the pursuers, that Dr M'Neill is about 80 years of age, although, from his having been born in a part of Ireland where no register of baptisms had been kept, his precise age is not exactly known; and finds it not denied by the defender, that Dr M'Neill is a man far advanced in years: Finds, That the missive under reduction, dated 25th December 1811, contains an agreement to the effect, that, as the defender had that day given the Doctor his bill for L. 230 sterling, payable three months after date, which was to be deducted from the account due by the defender to Dr M'Neill, he thereby agreed to free the defender from all bonds and other claims that he had against the

May 21. 1824. ' defender, on condition of his granting him a bond of annuity  
 ' during his life for a sum equal to  $7\frac{1}{2}$  per cent of the balance:  
 ' Finds, That Dr M'Neill having, on the very day on which the  
 ' missive was written, communicated the scroll thereof, as deli-  
 ' vered to him by the defender, to Walter Moir, accountant, now  
 ' acting as one of his trustees, that gentleman, upon the same day,  
 ' wrote to Gallochilly's agent, that "the Doctor had been just  
 ' mentioning to me something of an arrangement to be gone  
 ' into by Gallochilly and him, the meaning or effect of which he  
 ' does not seem to have any idea of;" and that this letter was  
 ' followed by a protest upon the 28th December 1811, on the  
 ' part of the present pursuers, as trustees for Dr M'Neill, against  
 ' the defender and his agent, demanding delivery of the agree-  
 ' ment as having been totally misunderstood by Dr M'Neill, and  
 ' offering back the promissory-note for L.230 sterling: Finds,  
 ' That there was no person present upon the part of Dr M'Neill  
 ' at the time this agreement was entered into, although there was  
 ' a man of business present on the part of the defender, and who  
 ' is the writer of the missive in question, which is a probative  
 ' document, in terms of the Act 1681: Finds, That the defender  
 ' kept this missive of agreement, and gave Dr M'Neill a scroll  
 ' not probative, whereby the defender had it in his power, by  
 ' destroying the probative document in his possession, to put an  
 ' end to all legal evidence of its existence; whereas Dr M'Neill  
 ' had no document whatever from which the agreement could  
 ' have been legally authenticated: Finds, That the accounts were  
 ' not adjusted, nor was the amount of the balance due by the  
 ' defender to Dr M'Neill ascertained at the time this missive was  
 ' entered into: Finds, That the agreement affords no presump-  
 ' tion of any intention upon the part of Dr M'Neill to abate any  
 ' part of his claim, nor to pass from any part of it as doubtful;  
 ' but, on the contrary, to convert the whole balance of principal,  
 ' of whatever remained after the payment of L.230, into an an-  
 ' nuity at the rate of  $7\frac{1}{2}$  per cent, which it is said the Doctor under-  
 ' stood to be a perpetual annuity; whereas the missive in question  
 ' bears, that it was only an annuity during his life: Finds, That an  
 ' annuity at the rate of  $7\frac{1}{2}$  per cent to a man of so great an age  
 ' as Dr M'Neill, was a most unequal and unfair transaction, as  
 ' the life of Dr M'Neill, at his age, was not insurable; and  $2\frac{1}{2}$   
 ' per cent above the ordinary interest afforded no compensation  
 ' for the sinking of the principal for such an annuity during the  
 ' Doctor's life: Finds, That a large part of the debt due by the  
 ' defender to Dr M'Neill was secured by heritable bond and

'infertment; whereas this agreement for sinking the balance  
 'into an annuity does not even stipulate heritable security for  
 'the payment of that annuity in lieu of the heritable debt  
 'which was to be thereby extinguished; and therefore, in the  
 'whole circumstances of the case, reduces, decerns, and declares,  
 'in terms of the libel. And in the action Hector Frederick  
 'M'Neill against Dr M'Neill for implement of the said agree-  
 'ment, absolves him from the conclusions of that action; and  
 'in both actions finds the said Hector Frederick M'Neill liable  
 'in expenses, of which allows an account to be given in, and  
 'decerns.' To this judgment the Court adhered on the 4th of  
 July 1816.\*

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In the meanwhile Dr M'Neill had died, leaving a deed of  
 settlement in favour of his natural daughter, Mrs Mary Black  
 M'Neill, spouse of Robert Jolly, of which a reduction had been  
 brought by his heir-at-law, on the ground of fraud and facility.  
 Issues were sent to a jury, who negatived the allegations of fraud,  
 but found that Dr M'Neill was facile. This, however, not being  
 sufficient of itself to set aside the deed, the Court sustained it,  
 and Mrs Jolly and her husband thereupon became parties to  
 this cause. At the distance of nearly five years after the last  
 judgment, the appellant brought an appeal against the interlocu-  
 tors setting aside the missive and refusing to give implement to  
 the transaction, on the ground,—

1. That as the missive was *ex facie* a regular and valid deed,  
 executed by a party *sui juris*, and who had homologated the same  
 by receiving the appellant's bill for L.230, it was binding and  
 effectual against him; and as there was no evidence either to  
 prove facility, or to shew that the consent by Dr M'Neill had  
 been obtained otherwise than lawfully, the judgments com-  
 plained of were erroneous. And,

2. That as the terms of the agreement were quite explicit, it  
 was impossible to allege that the Doctor had misunderstood  
 the transaction; and it was not relevant to state that there had  
 been inequality. To this it was answered,—

1. That although facility of itself was not sufficient to set aside  
 a deed, yet if it were combined with any other circumstance indi-  
 cative of an undue advantage having been taken of the facile  
 person, the deed was ineffectual: that, in the present case, Dr  
 M'Neill was nearly 80 years of age, and it had been proved by  
 the verdict of a jury that he was in a state of facility: that the

\* Not reported.



May 21. 1824. transaction upon the face of it appeared so grossly unequal and irrational, that it was plain that it could only have been brought about by a fraudulent advantage having been taken of his facility: and that it had been arranged in a tavern, where spirits had been introduced; and while Dr M'Neill was unassisted by a law adviser, the appellant had the assistance of an agent. And,

2. That as Dr M'Neill had subjoined a qualification, that the arrangement was to be adjusted by Mr Moir, and had gone to him upon the very day on which the transaction took place, with a view to obtain his advice; and as it appeared from the correspondence that he had misapprehended the nature of the transaction, there never had been any concluded agreement at all.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutors complained of affirmed, 'with L. 100 costs.'

*Respondents' Authorities.*—A. Ersk. 1. 27.; Kames' Prin. of Equity, p. 50.; Mackie, Nov. 24. 1752, (4963.); 1. Bridgeman's Index, 58.—Donald, June 12. 1821, (1. Shaw and Bal. No. 79.); Sanderson, Nov. 17. 1821, (Ib. No. 181.); Leiper, July 9. 1822, (Ib. No. 604.); Forbes, Dec. 13. 1822, (2. Shaw and Dunlop, No. 82.); E. of Roseberry, July 1. 1823, (Ib. No. 422.)

A. MUNDELL—MONCREIFF and WEBSTER,—Solicitors.

(*Ap. Ca. No. 42.*)

No. 30.

JOHN and ALEXANDER ANDERSON, and their Assignees,  
Appellants.—*Shadwell—Adam.*

WILLIAM BERRY and A. FORSYTH, (Fraser's Trustees,)  
Respondents.—*Warren—Abercromby.*

*Facility—Fraud.*—Circumstances under which (qualifying but affirming the judgment of the Court of Session) an heritable security was reduced, which had been obtained from a facile young man, for an alleged balance owing by his deceased father, arising out of a complicated state of accounts, which were not rendered to him, and for which, if there was truly a balance, other parties were liable.

May 26. 1824.

2D DIVISION.  
Late Lord  
Meadowbank,  
and Lord  
Pitmilly.

THE late James Fraser was proprietor of the estate of Pitcalzean, in the county of Ross, and was possessed of extensive estates in the West Indies, where he in general resided, and where he established certain partnerships, and particularly one, Fraser, Hubbard and Company. In 1799 the appellants, trading under the firm of John and Alexander Anderson, merchants in London, consigned to Fraser a cargo of slaves on board the

ship called the *Andersons*. This consignment he transferred to Fraser, Hubbard and Company, of which intimation was given to the appellants, who thereupon, (in addition to an account previously opened by them with Fraser), made out another with Fraser, Hubbard and Company, in which they debited them with the value of the slaves. Subsequent to this a great many transactions took place between that Company and the appellants, which gave rise to a complicated state of accounts.

May 26. 1824.

In 1801, Fraser, in the course of a voyage between Great Britain and the West Indies, perished, along with all who were on board of the ship. He left a widow and family, the eldest of whom was a son, James Fraser, junior, who at that time was in minority, and who succeeded as the heir of his father to the estate of Pitcalzean. Fraser appointed his widow, and certain other persons, his executors, one of whom was the appellant, John Anderson, who concurred with the widow in proving it. At the period of Fraser's death no settlement of accounts had been made between him and the appellants, or with Fraser, Hubbard and Company. Advances to a considerable amount were afterwards made by the appellants to the father of Fraser, senior, and to his widow and younger children; transactions were continued with his executors, some of whom resided in the West Indies; and the estate of Pitcalzean was managed by Mr Ross of Nigg, who resided in the immediate neighbourhood, and was a partner of the West Indian Companies.

James Fraser, junior, having gone to the West Indies, was seized with a fever, which had the effect, not only to impair his constitution, but to affect his mental powers. He was sent home to Scotland, where his health rather improved, but he was still in a state of mental imbecility. Being in want of money, he wrote to the appellants, informing them that he proposed to sell the estate of Pitcalzean, of which he wished to make them the first offer, but requested that in the meanwhile they would advance him L.200. The appellants thereupon wrote to their law-agent in Edinburgh, that the late Mr Fraser was indebted to them in upwards of L.1500; that they had eventual claims against him to a much larger extent; and to endeavour either to prevent the sale of the estate, or obtain a security over it for the debt. A transaction was then entered into, by which James Fraser, junior, agreed to give to the appellants an heritable bond over the estate of Pitcalzean for the L.1500, and also for the L.200 to be advanced to him; and accordingly, an heritable bond and infeftment, and also a promissory-note, were granted by him to the

May 26. 1824. appellants for these sums. No specific account of the alleged debt was rendered to James Fraser, junior, nor had any settlement been made with Fraser, Hubbard and Company, nor with the executors of the late Mr Fraser, and the above balance of L. 1500 arose partly out of the transactions with them.

Thereafter the appellants raised an action against James Fraser, junior, for payment of two bills drawn by Thomas Wade on and accepted by themselves, and another by Joseph Hunt on one Lawrence, amounting in all to L. 3431, which they alleged were debts truly due by his father, and for which he was liable. On this action they raised and executed an inhibition, and obtained decree in absence.

Soon thereafter James Fraser, junior, became insolvent, and granted a trust-deed in favour of the respondents, for behoof of his creditors. The respondents thereupon raised an action of reduction against the appellants, of the heritable bond and infestment, the promissory-note, and of the decree in absence, on the ground that they had been obtained from James Fraser, junior, sine redditis rationibus, while he was in a state of imbecility, and when in truth there was no debt justly due.

In defence it was maintained, that as James Fraser was sui juris, and had granted his solemn acknowledgment of the existence and amount of the debt, it was incumbent on the respondents to establish that no such debt existed, and that it had been sanctioned as correct by Mr Ross. The late Lord Meadowbank (before whom the case first came) pronounced this interlocutor on the 3d March 1809:—‘As to the validity of the heritable bond obtained by the defenders from James Fraser, now of Pitcalzean, finds, That in as far as arising from debt said to be incurred by the deceased James Fraser or his executors in the West Indies, in the course of extensive mercantile dealings with the defenders’ house in London, it is not alleged that the same was instructed by any settlement or accounting with the said deceased James Fraser, or with his executors, or with any person empowered by them on that behalf: Finds, that it is not explained how the opinion of Mr Ross of Nigg, who resides usually on his estate, and took charge of Pitcalzean as factor thereon, in favour of this debt, though proved to have been so given, which it is not, could have been formed on sufficient grounds, without first receiving the most ample communications from the executors in the West Indies, which it is not alleged he did; nor how that opinion could afford any sanction to obtaining the bond from James Fraser, who is not stated to have

May 26. 1824.

‘ taken himself any cognizance of the evidence on which it rested, or been in condition to take it: Finds it is not denied that the now deceased Mr Anderson, a partner of the house of the defenders, concurred with the widow of James Fraser in proving his will at Doctors’ Commons, as two of his executors alive when the said bond was obtained: Finds, that the decree in absence for the remainder of the debt claimed by the defenders, is in the same situation with that in the bond, as being supported by no settlement of accounts with the deceased Mr Fraser or the executors, and is also acknowledged to have been considered by Mr Ross as not sufficiently instructed: Finds, that it is acknowledged by the defenders, that part of this debt arises from transactions with the executors after James Fraser’s death, and that to the executors was committed, by the will of James Fraser, the exclusive charge of those West India concerns with which the defenders dealt during his life and after his death, and that the debt now challenged arose from those dealings: Finds, that under these circumstances it is competent for the defenders to have obtained security, by prohibitory diligence, for rendering their recourse effectual against the estate of Pitcairnan for any debt that may remain due of what may have been incurred to them by the deceased James Fraser; and before farther answer, ordains the defenders to put in a condescendence, and therein explain how they can competently, in hoc statu, instruct that such a debt exists, or the amount thereof, without in the first place obtaining, judicially or extrajudicially, a settlement with the executors, or prevailing with them to become parties to the action.’

The appellants having reclaimed, the Court, on the 23d February 1810, recalled ‘ that part of the Lord Ordinary’s interlocutor complained of, which ordains the defenders (appellants) to give in a condescendence, and remitted to his Lordship to allow the defenders (appellants) to produce their accounts and vouchers in support of the debt claimed by them, to hear parties thereon, and to do thereanent as he shall see cause.’ In consequence of this judgment, the Lord Ordinary made a remit to an accountant, who gave in a report, from which it appeared that there was no evidence of the existence of the debt contained in the documents under reduction, except the L. 200. The case having then come before Lord Pitmilley, he decerned in the reduction; and the appellants having reclaimed, the Court, on the 12th May 1819, found, ‘ That quoad the sum of L. 200 sterling advanced by the petitioners to the pursuer,

May 26. 1824. ' James Fraser, the writs called for to be reduced fall to be  
' supported as valid legal securities to the extent of that sum,  
' and the interest corresponding to it; and in so far alter the in-  
' terlocutors complained of, sustain the defences, assoilzie the  
' defenders, and decern; and remit to the Lord Ordinary to  
' hear the parties farther with regard to the other sums claimed  
' from the pursuer, James Fraser, as representing his father, and  
' accounts in question, and how far all parties interested are in  
' Court; and to do thereanent as he shall think just.'

The case then returned to the Lord Ordinary, who, on the 24th November 1819, pronounced this interlocutor :—  
' Finds, first, with regard to the promissory-note and heri-  
' table security under reduction, that in respect the only sum of  
' money advanced to James Fraser, junior, when he granted the  
' promissory-note and the disposition, was the sum of L. 200; and  
' in respect this loan was made to him by the defenders on con-  
' dition of his granting heritable security for the amount of the  
' loan, and at the same time for an alleged debt of his father,  
' James Fraser, senior, deceased—no detailed account, however,  
' of the alleged debt of the father having been given in and exa-  
' mined at the time, and without any settlement having been made  
' with the father's executors, or any attempt to constitute the debt  
' against them,—and the defenders not choosing to make the ex-  
' cutors or their representatives parties to the present action, or  
' to call them as defenders in a separate action,—and the late Mr  
' John Anderson, one of the partners of the defenders' house,  
' having been one of the executors of James Fraser, senior, and  
' having been alive when the heritable security was obtained by  
' the defenders,—the said promissory-note and heritable secu-  
' rity cannot be sustained, except to the extent of the foresaid  
' sum of L. 200, advanced by the defenders to James Fraser,  
' junior, to which extent these writs have been supported by the  
' interlocutor of Court of the 12th of May last. Separatim finds,  
' with regard to a part of the debt included in the promissory-  
' note and heritable security, viz. the debt transferred by the de-  
' fenders from the account of James Fraser, senior, to the account  
' of Fraser, Hubbard and Company, that although James Fra-  
' ser, senior, continued to be accountable, as an individual, to  
' the defenders, for the consignment of slaves by the Andersons,  
' notwithstanding of the transference of the account to Fraser,  
' Hubbard and Company, made by him, and recognized by  
' the defenders; and although James Fraser, senior, was also  
' accountable for this consignment, in his capacity of partner of

' Fraser, Hubbard and Company, yet the defenders were not May 26. 1824.  
 ' entitled, in settling with James Fraser, junior, and when ob-  
 ' taining heritable security from him as his father's representa-  
 ' tive for a debt alleged to be owing by the father, to transfer the  
 ' debt, according to their own statement of its amount, due for  
 ' the consignment per the Andersons, which had been made over  
 ' to Fraser, Hubbard and Company, but were bound to have  
 ' proved the subsistence and amount of the said debt, in the first  
 ' instance, by settling accounts with Fraser, Hubbard and Com-  
 ' pany, and giving them credit for every remittance made by  
 ' them: And finds, that the heritable security taken by the de-  
 ' fenders from James Fraser, junior, which includes the alleged  
 ' debt of Fraser, Hubbard and Company, cannot, in the present  
 ' action, in which Fraser, Hubbard and Company are not par-  
 ' ties, and no settlement of accounts with them having taken place,  
 ' be supported, in so far as it covers this debt, on the footing of  
 ' its having been a debt of James Fraser, senior, whether as an  
 ' individual or as a partner of Fraser, Hubbard and Company:  
 ' Farther finds, that in accounting with James Fraser, junior,  
 ' and these accounts being the subject of discussion in an action  
 ' to which the defenders have not made the executors of James  
 ' Fraser, senior, or their representatives, parties, the defenders  
 ' are not entitled to take credit for sums of money said to have  
 ' been paid by them to the father, widow, and younger children  
 ' of James Fraser, senior, posterior to his death, although these  
 ' payments are said by the defenders to have been sanctioned by  
 ' the executors: And finds, that the defenders ought to settle  
 ' this matter with the executors themselves, or their representa-  
 ' tives, the more particularly as the allegation of the executors  
 ' having authorized the payments is, on the authority of the letter  
 ' of the 3d March 1802, denied by the pursuers as to Mr John  
 ' Anderson, who was one of the executors, and also a partner of  
 ' the defenders' house, by whom, on the alleged authority of the  
 ' executors, the payments are said to have been made. On these  
 ' grounds, sustains the reasons of reduction of the promissory-  
 ' note, disposition, and infeftment, except quoad the sum of  
 ' L. 200, as to which the writs have been supported by the inter-  
 ' locutor of Court above referred to. With this exception, re-  
 ' duces, decerns, and declares, in terms of the libel. *2dly*, With  
 ' regard to the decree in absence, finds, in respect of the reasons  
 ' in the accountant's report, and of the admissions of the pur-  
 ' suers with regard to Hunt's bill, that the said decree must sub-  
 ' sist, in so far as it relates to this bill, with corresponding interest

May 26. 1824. ' from 29th of August 1802, but under deduction of L. 354. 5s.  
' as the damages stated for returning the bill; but quoad ultra  
' reduces, decerns, and declares, as to the decree in absence, in  
' hoc statu, in terms of the libel: Finds the pursuers entitled to  
' expenses, but subject to modification, on account of the two  
' points which have been determined in the defenders' favour.'

To this judgment his Lordship adhered on the 17th December 1819 and 17th May 1820. Both parties having then reclaimed, the Court, on the 13th June 1821, refused the petition of the appellants; but in relation to that of the respondents they altered ' the interlocutors complained of, in so far as they find  
' that the decree in absence must subsist in so far as it relates to  
' Hunt's bill, in respect that, though it is admitted to be a good  
' claim against the estate of James Fraser, senior, it cannot be  
' sustained in the present accounting; and therefore reduced the  
' decree in absence in toto; and quoad ultra adhered to the in-  
' terlocutors of the Lord Ordinary complained of.'\*

Against these judgments the appellants and their assignees entered an appeal, in support of which they maintained,—

1. That as the debt was constituted by written documents, ex facie valid and legal, the onus probandi that no such debt existed lay upon the respondents, and could only be established by the writ or oath of the appellants; and as no such proof had been adduced, and the report of the accountant was erroneous, they were entitled to absolvitor.

2. That there was sufficient evidence by the documents in process to establish the existence of the debt. And,

3. That as the bills relative to which the decree in absence had been pronounced, were justly due by the late Mr Fraser, and as he was represented by his son, there were no grounds for setting it aside.

To this it was answered:—1. That as the heritable bond had been obtained by the appellants tempting a facile young man with a loan of L. 200, to supply his present wants, and for an alleged balance of accounts, sine redditis rationibus, it could not be sustained as a ground of preference over the creditors of James Fraser.

2. That as it had been proved by the report of an accountant that no debt was justly due, both the security and the decree in absence must be set aside. And,

3. That the bills for which the decree in absence had been

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\* See 1. Shaw and Ballantine, No. 82.

pronounced could not be brought into the present accounting, May 26. 1824.  
so as to constitute them an heritable debt on the estate.

The House of Lords found, ' That, under the circumstances of  
' this case, the promissory-note and heritable security under re-  
' duction cannot be sustained, except to the extent of the sum of  
' L. 200 advanced by the appellants to James Fraser, junior; and  
' further find, that the decree in absence, in the proceedings  
' mentioned, ought to be reduced in toto. And it is therefore  
' ordered and adjudged, that so much of the interlocutor of the  
' Lord Ordinary of the 24th of November 1819, complained of  
' in the said appeal, as reduces the said promissory-note, and  
' disposition and infestment, except as to the said sum of L. 200,  
' be affirmed; and in regard to the other special findings in  
' that interlocutor, the Lords declare, that this House does not  
' feel it necessary to give any opinion thereon. And it is fur-  
' ther ordered and adjudged, that so much of the interlocutor  
' of the Lord Ordinary of the 17th December 1819, and the 17th  
' May 1820, and so much of the interlocutors of the Lords of  
' Session of the Second Division, of the 19th June 1821, and of the  
' 19th June (signed 14th June) 1821, also complained of in the  
' said appeal, which adhere to such parts of the said interlocutor of  
' the Lord Ordinary of the 24th of November 1819 as are hereby  
' affirmed, be affirmed: And it is further ordered and adjudged,  
' that so much of the said interlocutor of the 19th June (signed  
' 14th June) 1821, as reduces the decree in absence in toto, be  
' affirmed: And it is further ordered, that the cause be remitted  
' back to the Court of Session, to do therein as shall be consis-  
' tent with this judgment, and as shall be just.'

OSBALDISTONE and MURRAY,—Solicitors.

(*Ap. Ca. No. 43.*)

JAMES, WOOD and JAMES, Appellants.—*Marryat—Stephen.*

No. 31.

JOHN TELFORD, for the Stirling Bank, Respondent.—

*John Campbell.*

*Principal and Agent—Bill of Exchange.*—An agent for a Company having in his own name drawn bills on a purchaser of goods from the Company, which the purchaser accepted, and having discounted them with a banker, by indorsing them also in his individual name, and he and the purchaser having become bankrupt;—Held, (reversing the judgment of the Court of Session), That although the agent was in the practice of drawing and discounting bills, sometimes in his own name, and at others per procuration of the Company, and the Company settled with the purchaser on the footing of his having granted these bills, yet, as the name of the Company was not on the bills, no claim lay against it for payment of them.



May 26. 1824.

1st Division.  
Lord Gillies.

THE appellants, James, Wood and James, were wholesale dealers in tallow, residing in London, and had been in the practice for many years of supplying soap-boilers and tallow-chandlers in Scotland with that commodity. For the management of their business in Scotland, they appointed George Arnott, merchant in Leith, as their agent, who accordingly acted for them in that capacity; drew bills upon the parties to whom the goods were sold, and discounted them, sometimes in his own name, and at others per procuracion of James, Wood and James, and accounted to that Company for the proceeds. Among others, Robert Paterson, soap manufacturer in Stirling, had frequently purchased tallow from the appellants, and many of the bills which were drawn upon him by Arnott, and accepted by him for the price of the goods, had been discounted with the Stirling Bank, of which the respondent, Telford, was the cashier. On the 1st of January 1819, the appellants shipped a quantity of tallow to Paterson, amounting in value to L.385. 9s. 6d., of which they informed their agent, Arnott. At this time Arnott had gone to Holland, and had left with his clerk, Alexander Miller, several blank bill stamps subscribed and indorsed by him, to be filled up and negotiated if necessary. On receiving the letter of the appellants, Miller filled up two of these bill stamps, the one for L.64. 19s. 6d. dated 8th January 1819, drawn upon Paterson, and the other for L.290. 10s. dated the 11th of January, also upon Paterson; thus leaving a balance of L. 30 due of the price. The first of these bills was expressed in these terms:—‘ L.64. 19s. 6d. Leith, 8th January 1819. ‘ Four months after date, pay to my own order Sixty-four ‘ pounds nineteen shillings and sixpence sterling, per value received. GEORGE ARNOTT. Mr Robert Paterson, soap manufacturer, Stirling. (Indorsed) George Arnott.’ And the other was thus expressed:—‘ L.290. 10s. Leith, 11th January 1819. ‘ Four months after date, pay to the order of myself, Two ‘ hundred and ninety pounds and ten shillings sterling, for value ‘ received. GEORGE ARNOTT. (Addressed) Mr Robert Paterson, soap manufacturer, Stirling. (Indorsed) George Arnott.’ These two bills Miller, acting ‘ for George Arnott,’ enclosed in a letter to the respondent, Telford, requesting him to get them accepted, and to send him the proceeds. This, accordingly, Telford did, by transmitting the draft of the Stirling Bank upon Edinburgh for L.349. 3s. 6d. in favour of Arnott; and it was alleged by Telford, that when he presented the bills for accept-

ance, Paterson informed him that they were on account of the tallow which he had received from the appellants. It was also alleged, and offered to be proved, that the cash received for these bills was placed by Arnott to the credit of the appellants. May 26. 1824.

Thereafter, and before the bills fell due, one of the appellants came to Scotland, and settled with Paterson for the balance of L.30, by receiving from him a promissory-note for L.25, and deducting the remaining sum of L.5. This note he indorsed to, and discounted with, the Stirling Bank in name of the Company, who, about the same time, withdrew their agency from Arnott. Both Paterson and Arnott became bankrupt, and the bills having been dishonoured, Telford, on behalf of the Stirling Bank, claimed payment of them from the appellants, on the footing that they were the parties truly interested in them, and that Arnott had acted as their representative and agent. This having been resisted by them, (except as to the promissory-note of L.25, which they stated they were ready to pay), an action was brought against them and the other parties by Telford, in which the Lord Ordinary decerned against the appellants in terms of the libel; and he refused a representation, 'in respect that the bills in question were granted for the price of goods sold by the representers to the acceptor, and that the same were drawn and discounted by Arnott merely as the representers' agent, and for their behoof.'

The appellants having reclaimed, the Judges expressed an opinion, that the reasons assigned by the Lord Ordinary were perfectly sound; that there was a distinction between the case where a party was vested with the full powers of a general agent for negotiating the affairs of another, and where they were of a limited nature; and that in this case it was satisfactorily proved, that Arnott had been in the practice of drawing and discounting bills on behalf of the appellants; and consequently they were liable for the debt in question. Their Lordships, therefore, adhered on the 14th December 1821, refused a petition on the 5th of February 1822, and found expenses due.\*

The appellants then entered an appeal to the House of Lords, and maintained,—

1. That as the bills were drawn and indorsed by Arnott simply as an individual, and as he had not subscribed per procuracion of them, nor expressed that they were for value received from

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\* See 1. Shaw and Ballantine, No. 329.

May 26, 1824. them, and as their names did not appear upon the face of them, they must be held to have been received, and the money paid for them, in reliance on the credit of Arnott, and not of that of the appellants; and accordingly there could be no doubt, that if the appellants had become bankrupt, the respondent would have been entitled to have claimed the full amount against Arnott as liable individually; whereas, on the supposition that the transaction had taken place with him as a mere agent, the respondent could have made no such claim against him; and therefore, as the bills established an individual liability, it was impossible to hold that the respondent had discounted them on the faith of Arnott being their agent.

2. That although it was perfectly true that Arnott acted as their general agent, and that he did so in *drawing* the bills in question upon Paterson, and although, no doubt, the appellants were bound to that extent by his acts, and had settled on that principle with Paterson by giving him credit for these bills, (because it was within the limits of Arnott's powers as their agent to draw bills), yet he had no power to *indorse* or discount them, and so pledge the credit of the appellants to third parties; and, even supposing he had discounted them as their agent, they could not be bound by his unauthorized acts: but in this case he had not done so, and had merely pledged his own credit.

3. That it was a general rule, that a written obligation could not be established against a party unless his subscription appeared on the face of it, or was signed per procuration; and as in the present case the subscriptions of the appellants were not on the face of the bills, and Arnott had not signed per procuration of them, it was impossible to proceed against them under these bills.

On the other hand, it was maintained by the respondent,—

1. That as Arnott had acted confessedly as the agent of the appellants, and as he had been in the practice of drawing and discounting bills in relation to their transactions, sometimes in his own name, and on others in that of the appellants, and this had been sanctioned by them; and as the bills in question arose out of one of these transactions, and had been drawn by Arnott as their agent, and for their behoof, and the proceeds had been carried to their credit, the respondent was entitled to recover payment from them.

2. That as Arnott was the general agent of the appellants, and was not restricted to the performance of a particular act, and had been in the practice of negotiating the bills of the appellants, he had full power to discount those in question, and to bind the appellants. And,

3. That the facts and circumstances were at least sufficient to constitute an obligation of relief against the appellants. May 26. 1824.

The House of Lords found, 'That the appellants are not liable to make payment to the respondent, as cashier and for the behoof of the Stirling Bank Company, of the principal sums of L.64. 16s. 6d. and L.290. 15s., contained in and due by the two bills drawn by George Arnott on George Paterson, or interest thereon, or expenses of protesting the same, or any part thereof; and it is therefore ordered and adjudged, that the said interlocutors complained of, so far as they are inconsistent with this finding, be reversed. And it is further ordered and adjudged, that so much of the said interlocutors of the Lords of Session of the First Division, of the 14th of December 1821 and the 5th of February 1822, as finds the appellants liable, conjunctly and severally, to the respondent in the expenses of process, be reversed. And it is further ordered, that the cause be remitted back to the Court of Session to apply the foregoing findings, and to do further therein as may be just.'

**LORD GIFFORD.**—My Lords, In this case the respondents sought, by action in the Court of Session, to recover from the appellants three sums, of L.64. 19s. 6d. L.290. 10s. and L.25. on account of certain transactions, the outline of which may be thus represented.

A person of the name of George Arnott, merchant in Leith, had been employed to act as agent for the appellants, who are soap manufacturers in London; and a Mr George Paterson, soap manufacturer in Stirling, having commissioned from them a quantity of goods, owed them on that account, in the beginning of the year 1819, a sum of between L.300 and L.400. It appears, my Lords, that Arnott, having occasion to go to the Continent, left with Alexander Miller, his clerk, certain bills in skeleton, (*i. e.* blank in the dates, the sums, and name of the drawer, but signed by himself as drawer and indorser), to be filled up by his clerk according to circumstances, and that the clerk had filled up two of these bills by converting them into drafts upon Paterson for L.64. 19s. 6d. and L.290. 10s.

It farther appears, my Lords, that in the course of his transactions as agent for the appellants, Arnott had been in the habit of drawing upon their debtors, but that this had been expressed as done by procuration. Here, however, the bills were drawn in the name of Arnott only, by Miller the clerk, who transmitted them to the respondent in a letter of 9th January 1819, for the purpose of obtaining Paterson's acceptance to each, and of having them afterwards discounted. To this letter the respondent returned an answer in these terms:—'Stirling Bank, 12th January 1819. The amount, L.355. 9s. 6d. discount and postage L.6.—L.349. 9s. 6d.; for which I enclose, as you desire,

May 28. 1824. 'my draft on Edinburgh, L. 349. 9s. 6d. stamp 6s.—L. 349. 9s. 6d. I am, Sir, your most obedient servant, (Signed) JOHN TELFORD. To Mr George Arnott, Leith.'

My Lords,—Before these bills became due both Arnott and Paterson became insolvent, and a claim having been made for the amount by the respondent upon the appellants, they refused payment, on the ground that they were not parties to the bills in any shape, nor were in any way bound for them. After these bills had been discounted, but before the time of their falling due, one of the partners of the appellants' house having come to Scotland, called on Paterson, and learning from him that such acceptances had been given to Arnott, took Paterson's promissory-note for L. 25, which, with a trifling balance of L. 5, (probably allowed for discount), made a sum upon the whole equal in amount to Paterson's debt. Arnott's name is not upon the promissory-note, but, in the action brought before the Court of Session, he, as well as the appellants, is called as defender, and concluded against for this as well as the other two sums. (Here his Lordship recited the terms of the summons, defences, and interlocutors in the Court of Session).

My Lords,—It was contended below, that the appellants must be liable, as the transaction was for their benefit, and accomplished by their own agent; or, as expressed in the Lord Ordinary's interlocutor of 16th May 1821, 'In respect that the bills in question were granted for the price of goods sold by Messrs James and Company to the acceptor, and that the same were drawn and discounted by Arnott, merely as their agent, and for their behoof:'—A ratio decidendi, my Lords, which must be presumed to have been approved of by the Lords of the First Division, when they affirmed that interlocutor. My Lords, undoubtedly no action can lie against the appellants on these bills, as their names are not upon them; but I am unable to see any other grounds upon which the respondent can recover. It is admitted, that Arnott had authority to draw bills for the appellants, but in no other way than by procuration from them; and it has not been denied in the course of the pleadings, that Arnott was in the practice of discounting bills with the respondent, not only in the character of agent for the appellants, but on his own account. The bills must therefore necessarily be held as having been discounted on the credit of Arnott and Miller.

My Lords,—It has been said, that the money received on discounting these bills had been accounted for by Arnott to the appellants; but I can find no evidence of this, or that the proceeds had been placed to their credit in any way whatever.

The sole question therefore is, Whether the discount was made by Arnott, on his own credit, or on that of Paterson? My Lords, in such a question, the law of Scotland must be considered the same as the law of England; and it appears from the series of authorities cited for the appellants, in particular from that of Emly, tried before my

Lord Ellenborough, that no action like the present could be sustained in this country. May 26. 1824.

My Lords,—Upon the most careful consideration which I have been able to bestow upon this case, I am very clearly of opinion, that with regard to the two bills, the interlocutors complained of cannot be supported, and that they ought in so far to be reversed. But, my Lords, your Lordships cannot adjudge a general reversal; for, as to the promissory-note for L. 25, the appellants never denied their liability to that extent; but although Arnot's name does not appear upon that instrument, he (as well as they) has been found liable for payment of the contents in the Court below. It will therefore be necessary that a special remit be made to the Court of Session, to apply your Lordships' judgment to the particular situation of that article.

*Appellants' Authorities.*—3. Term Rep. 757.; 2. Campbell, 308.; 15. East, p. 17.; 10. Vesey, 206.; 12. Mod. Rep. 243.; 1. Esp. 4.; 10. Vesey, junior, 206.

*Respondent's Authority.*—Paley, p. 144.

TUSTIN—ROBINSON and BURROWS,—Solicitors.

(Ap. Ca. No. 44.)

ROBERT CUNNINGHAM, Appellant.—*Shadwell—Walker.*

No. 32.

PATRICK WARNER and R. BEAUMONT, Respondents.—*Murray—Abercromby.*

*Partnership—Clause.*—Two parties having entered into a contract of partnership for working coal, under which a permission, in general terms, was granted to work coals in the lands of one of them, by means of pits sunk in the lands of the other; and having thereafter entered into another contract, prorogating the whole terms of the first contract, but declaring that the coal in the lands of the first party should be worked only to the east of a certain point;—Held, (reversing the judgment of the Court of Session), That the company had no right to work beyond that point.

ROBERT REID, afterwards Cunningham, the father of the appellant, was proprietor of the lands of Saltcoats Campbell, (on which he had erected salt-pans), adjoining to those of Ardeer belonging to Patrick Warner, the father of the respondent; and both of which properties are situated in Ayrshire. Ardeer lies to the south-east of Saltcoats Campbell, and is divided from it, on the west, by a rivulet called the Stevenston-burn, and near to which, on Saltcoats Campbell, there is a stratum of whinstone, called the Capon Craig-gall. In 1770 Reid and Warner entered

May 26. 1824.

1ST DIVISION.  
Lord Alloway.

May 26. 1884. into a verbal agreement, by which they became partners in the working of coal and making salt; and in 1774 they reduced it into the form of a regular contract of partnership-lease for seventeen years; by which Warner let to himself and Reid the coal situated within his lands of Ardeer, while Reid, on the other hand, let his salt-pans to himself and Warner. Accordingly the deed proceeded on the narrative, that ‘the said parties having some time ago entered into a verbal agreement, on their mutual charge, and for their mutual interest, to work the coal within the above-mentioned lands, belonging to the said Patrick Warner, under direction of the said Robert Reid, as well for exportation as for inland sale, also with the pan-coal thereof, or others, to make salt in the salt-pans, and garnel, which belonged to Auchenhavrie’s heirs, to which the said Robert Reid has acquired, or is about to complete a title, &c. in the profits or loss on which coal and salt the said parties were and are to be equal sharers; in consequence of which verbal agreement, the said parties, on their joint and equal charge and expense, have set down pits, erected a machine, made a canal, with a coal-yard at the end thereof, have been working and selling coals, and making and selling salt for their joint behoof;’—therefore Warner let to himself and Reid, ‘All and Haill the whole seams or seam of coal within all or any part of the said lands, sometime called Dovecot-hall, now Ardeer, &c. lying in the parish of Stevenston, &c. which includes all his lands in that parish; also All and Haill whatever part of the said lands are, or shall necessarily be required for coal-hills, coal-bings, road, and canal, &c. with power to set down pits, make coal-hills, and others foressaid.’ On the other part, Reid let to Warner and himself, and to their respective heirs, ‘the foressaid salt-pans and materials thereof, with the salt-garnel, and such of the lands belonging to the heirs of Auchenhavrie, or their assignees, as are used for the canal and coal-yard; and that for the like space above-mentioned.’ And, lastly, there was a clause introduced in these terms:—‘And albeit there is no liberty here- in granted of setting down pits in the ground belonging formerly to Auchenhavrie, now to his heirs and assignees, called Saltcoats Campbell, adjoining to the said lands of Patrick Warner, yet liberty is granted to work the coal beneath the same, from any pit in Mr Warner’s ground, so far as the levels will admit of.’

After the parties had acted upon this contract for several years, they made a new agreement in 1783, which proceeded on

the narrative, ' That the endurance of the said tack or contract May 26. 1894.  
 ' is too short, and that it will tend to their mutual benefit, and to  
 ' the advantage of their heirs, that the same shall be prolonged  
 ' and continued for a much longer space of time.' And there-  
 ' fore they ' not only prorogate the foresaid tack or contract on  
 ' both sides for the further space of 99 years; but also of new  
 ' the said Patrick Warner sets to himself and the said Robert  
 ' Reid Cunninghame, equally betwixt them, and their respective  
 ' heirs, the foresaid coal in the whole lands in Stevenston parish  
 ' belonging to him the said Patrick Warner, with whatever land  
 ' shall be necessary for coal-hills, bings, roads, and canal; and  
 ' that for the space of 124 years from and after the foresaid 20th  
 ' day of April 1770, for the foresaid yearly rent of L. 100 ster-  
 ' ling; and the said Robert Reid Cunninghame sets to himself  
 ' and the said Patrick Warner, equally betwixt them, and their  
 ' respective heirs, the foresaid salt-pans, materials thereof, and  
 ' girnals, and such lands of his as are used for the canal, and  
 ' the coal in his said lands *lying east of the Capon Craig*; and  
 ' that for the like space of 124 years from the said 20th day of  
 ' April 1770, for the like yearly rent of L. 100 sterling, includ-  
 ' ing in this set the coal in Little Dubs and Boag, and also  
 ' whatever coal he may succeed to in the Broom.'

Under this agreement the coal was worked in Warner's ground, and pits were also sunk in that part of Cunningham's property which was situated on the east side of the Capon Craig-gall.

After the deaths of the two partners, they were succeeded by their respective sons, the appellant and respondent, who having got involved in a dispute, the Sheriff of the county, under a clause in the lease authorizing him to name a manager, appointed Beaumont to that office. In 1827 the appellant began to sink a pit on the west side of the Capon Craig-gall, with the view of working the coal situated upon that side of it, for his own private behoof. Against this Warner presented a petition to the Sheriff, praying for an interdict, on the ground that, by the original contract, as prorogated by that in 1783, the whole coal situated in Saltcoats Campbell had been let to the Company. The Sheriff, after causing an inspection to be made, so as to ascertain whether it was practicable, by means of pits situated in Warner's grounds, to work the coal, not only on the east, but also on the west side of the Capon Craig-gall, by cutting through it, found, ' that  
 ' the Company have a right to work coal under the Saltcoats  
 ' Campbell, from pits sunk in the Ardeer grounds, the same



May 26, 1824: 'having been declared by the reporter to be practicable and expedient; and that Mr Cunningham has no right to work the coal under Saltcoats Campbell, on his own private account, during the subsistence of the present copartnery;' and therefore granted interdict. The appellant then presented a bill of advocacy, which Lord Cringletie refused, 'in respect that by the first contract, dated 20th June 1774, between the predecessors of the parties to this cause, liberty is given to work for the behoof of the copartnery the coal in the lands of Saltcoats Campbell, from any pit in Mr Warner's grounds, so far as the levels will admit of; 2dly, That there is no limitation of this general right of working said coal, by confining it to any particular part of said lands, nor any reference to, or even mention of, the Capon Craig-gall as the boundary of said rights; 3dly, That as by the second contract between the same parties, dated 12th August 1783, there is a prorogation of the period embraced by the first contract, and an extension of the rights therein contained, but no diminution of them; and, lastly, That by the report of Mr Dixon it is ascertained, and not denied by the complainer, that it is practicable, and may, at some future period of the contract, be expedient to work the coals in the said lands of Saltcoats Campbell, by means of pits in Mr Warner's lands; refuses this bill.'

His Lordship also subjoined this Note.—'The Lord Ordinary observes, that the complainer places some stress on the expression in the first contract, that the liberty to work coals in Saltcoats Campbell, by pits in Mr Warner's lands, is said to be in those lands, "adjoining" to Mr Warner's lands: the words are, "and albeit there is no liberty herein granted for setting down any pit in the ground belonging formerly to Auchenhavie, now to his heirs and their assignees, called Saltcoats Campbell, adjoining to the said lands of Patrick Warner, yet liberty is granted to work the coal beneath the same from any pit in Mr Warner's ground."

'The Lord Ordinary considers the word "adjoining" as merely descriptive of the situation of the lands of Saltcoats Campbell, and cannot, with any propriety, be held to limit the right of working the coal. For the right to work is, from any pit in Mr Warner's ground, west of the Capon Craig-gall; so that the right to work in Saltcoats Campbell adjoining, from any pit in Mr Warner's property, would be annihilated, if that right were confined to the coal to the east side of that Gall; and, 2dly, If the parties had in view to limit the right of working

‘the coal in the complainer’s property, to the stripe lying between Stevenston-burn on the east and the Capon Craig-gall on the west, it is not credible, that where there are two such distinct known boundaries, they would not have been mentioned; but, on the contrary, the right should have been given broadly over the lands of Saltcoats Campbell, from any pit in Mr Warner’s ground, so far as the level will admit.’ May 26. 1821.

Cunningham having reclaimed to the Second Division, their Lordships passed the bill; and he then brought an action of declarator to have it found, ‘that according to a just, sound, and bona fide construction of the foresaid second contract, the said copartnery only got right to, and were entitled to work the coal, in or under the pursuer’s lands of Saltcoats Campbell, adjoining to the said lands of Ardeer, to the line or boundary called the Capon Craig-gall, on the west side of Stevenston-burn, and no farther; and that no part of the coal, lying in or under the said lands of Saltcoats Campbell, to the west of the Capon Craig-gall, was at all included, or meant to be included, in the lease or rights conferred by the said contracts, or either of them;’ and, therefore, that the respondents should be prohibited from working ‘the coal in or under any part of the said lands of Saltcoats Campbell, lying to the westward of the Capon Craig-gall, in all time coming.’

This action having been conjoined with the advocacy, and the case having come before Lord Alloway, his Lordship, ‘for the reasons assigned by the Sheriff, and by the Lord Ordinary on the Bills, remitted the cause simpliciter, and assoilzied from the declarator, and found expenses due.’ To these judgments the Court adhered on the 6th January 1821.\*

The appellant then brought an appeal, and contended, that as this was a contract *uberrimæ fidei*, it ought to be construed according to what was the real meaning of the parties, and not according to a literal and judaical interpretation: that, by the original agreement, the appellant’s father was to contribute the salt-pans as his share of the Company stock, while, on the other, the respondent’s father was to convey the coal in his lands, which were to be worked at the expense of the Company; and the clause which was introduced into the original contract, permitting coal to be wrought out of the property of the appellant’s father, by means of pits sunk in that of Warner,

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\* Not reported.

May 26, 1824. was introduced merely to prevent disputes, in case the workings should be accidentally extended into the lands of the appellant, but which it was never contemplated could go beyond the Capon Craig-gall, which was then considered as an impenetrable barrier; and that, accordingly, in the contract of 1783, the only part of that property which was let, 'was that lying east of the 'Capon Craig-gall.' In support of this interpretation, the appellant referred to various judicial statements, which had been made by the respondent Warner in a former process, where he found it his interest to contend for this construction.

On the other hand, the respondents maintained, that by the original contract liberty was granted to work the whole coal in Saltcoats Campbell, so far as the levels would admit of this being done, which it was proved by the report of an inspector could be accomplished throughout the whole lands by means of pits in Warner's ground; and that, as this contract was, in the whole articles thereof, expressly prorogated by that of 1783, the original power remained in full force.

The House of Lords found, 'That the company or copartnery 'are only entitled to the coal in and under the appellant's lands 'of Saltcoats Campbell, to the east of the Capon Craig-gall, 'during the period of the endurance of the copartnery. And it 'is therefore ordered and adjudged, that those parts of the inter- 'locutors complained of, which are inconsistent with the above 'finding, be reversed. And it is further ordered and adjudged, 'that such parts of the interlocutors complained of, by which 'expenses are given against the appellant, be also reversed. 'And it is further ordered, that the cause be remitted back to 'the Court of Session, to do in the conjoined processes as shall 'be consistent with this judgment, and as shall be just.'

SPOTTISWOODE and ROBERTSON—A. DOBIE,—Solicitors.

(*Ap. Ca. No. 54.*)

No. 33. GEORGE GEDDES, and J. G. GELLER and Others, his Assignees,  
Appellants.—*Hart—Shadwell.*

CÆSAR MOWAT and WILLIAM SPENCE, Respondents.—*Skene—  
Maidment.*

*Bankrupt—Sequestration—Commission of Bankruptcy—Stamp.*—A domiciled Scottish merchant having, after contracting debts in Scotland, gone to England, and there

committed an act of bankruptcy, and a petition for sequestration having been presented to the Court of Session, founding on a bill written on a wrong stamp, and an affidavit to the verity of the debt; and a deliverance having been written on the petition prior to the issuing of a regular commission of bankruptcy;—*Held*, (affirming the judgment of the Court of Session), 1. That the sequestration was preferable to the commission of bankruptcy; and, 2. That the affidavit to the verity of the debt was sufficient to support the petition, accompanied by the bill.

THE appellant, George Geddes, was a native of Stromness, in Orkney. He carried on business in Liverpool till 1810 along with a Mr Hay, under the firm of Geddes, Hay and Company, when, having become insolvent, he settled with his creditors by a composition, and returned to Stromness. His father had been a banker there, and on his death in 1821, Geddes commenced business also as a banker, in the course of which he contracted debt to a large amount. Among others, he was indebted to the respondents, Mowat and Spence, in L.323, for which he granted his promissory-note, dated 30th September 1819, payable two months after date. This bill was written on a five shillings stamp, in consequence (as appeared from a marking on the bill) that no stamp of the proper value could be got at Stromness. In the month of November thereafter, he secretly conveyed his whole estates and effects to two of his brothers-in-law, and in December he went to London by sea, where he arrived towards the end of that month. On the 4th of January 1820 he committed an act of bankruptcy, and a commission was issued against him on the 18th of the same month. On the 26th, the respondents, founding upon the promissory-note and affidavit, in which they deposed that Geddes was indebted to them in the sum there specified, presented a petition to the Court of Session, praying for sequestration of his estates. A warrant of service was granted on the following day, the 27th, which, together with the petition, was immediately recorded, and served upon Geddes by leaving a copy at his house in Stromness, with his agents in Edinburgh, and by citing him edictally.

It having been discovered that the commission of bankruptcy was irregular, a new one was issued against him on the 15th March 1820; and in the month of April thereafter the appellants, Geller and others, were appointed assignees under the commission. Appearance was then made by Geddes and the assignees, who resisted sequestration being awarded, on the ground, 1. That the promissory-note being written on a wrong stamp, could not form the foundation of any legal proceeding; and, 2. That as a commission of bankruptcy had been issued, it had the effect to vest

June 4. 1824.

1st DIVISION.  
Lord Hermand.

June 4. 1824. the whole effects of Geddes in his assignees, so that a sequestration was incompetent. Lord Hermand, however, as Ordinary on the Bills, awarded sequestration on the 16th August 1820. A petition was then presented by Geddes and the assignees, praying for a recall of the sequestration, in support of which it was argued, that, independent of the irregularity of the bill, (which was of itself sufficient to render the proceedings inept), the commission of bankruptcy, which had been issued on the 15th of March 1820, had a retrospective effect to the act of bankruptcy committed on the 4th of January that year; and as the first deliverance on the petition for sequestration had not been pronounced till the 27th of that month, it must be held to be posterior to the commission of bankruptcy.

To this it was answered, 1. That as the respondents had made oath to the verity of their debt, this was sufficient, independent of the bill, to support the petition for sequestration.

2. That as Geddes had carried on business at Stromness, and had there his domicile, and had gone to England with the fraudulent intention of there suing out a commission of bankruptcy, and secretly obtaining his certificate, he must be held to have been a domiciled Scottish merchant; and therefore, even supposing that the commission of bankruptcy had been prior to that of the first deliverance on the petition for sequestration, that commission could not have the effect to carry off the effects of the bankrupt, which, according to a fixed principle of international law, were to be considered as situated in that country where the bankrupt had his domicile, and to be distributed under the law of that country. And,

3. That as the first deliverance on the petition for sequestration was dated on the 27th January 1820, and as it was admitted that the only regular commission which had been issued was dated in March thereafter, the former was entitled to be preferred.

The Court refused to recall the sequestration, and found expenses due; and to this interlocutor they adhered on the 17th of January 1821.\*

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\* Not reported.—It is stated in the case for the respondents, that 'when the petition was moved, it was observed on the Bench, that the date of the issuing of the commission had hitherto regulated all questions of this kind, and justly so, because it was the first sentence of the foreign Court which could have the effect of operating as an assignment; that creditors in a different country, where the bankrupt might have had a domicile of trade, could know nothing of the date of an act of bankruptcy; and that

Geddes and his assignees having appealed, the House of Lords June 4. 1824.  
 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed, with L. 200 costs.'

*Respondents' Authorities.*—Cullen's Bankrupt Law, 24, 25.; 2. Bell, 558.; 54. Gep. III. c. 137. § 22.; Maitland, March 4. 1807, (F. C.)

ADDINGTON and GREGORY—T. SMITH,—Solicitors.

(Ap. Ca. No. 48.)

JOHN TAYLOR, Esq. Appellant.—*Jeffrey*—*R. Bell*.

No. 34,

SAMUEL LONG, Heir of RICHARD CROF, Respondent.—  
*A. Wood.*

*Agent and Client.—Fraud.*—An agent having been employed to recover a debt for a client, (for whom he was also trustee), which at one time had been considered almost desperate; and having got a decree for upwards of L. 1400, and a warrant for payment of L. 1000; and having informed the client of this latter circumstance, and requested to know what he would allow him for having realized so large a part of the debt, and incurred so much risk, trouble, and expense; and having narrated the circumstances in a power of attorney, which the client executed in his favour, but not having transmitted his account of expenses, which amounted to only L. 18; and the client having agreed to discharge him on paying L. 500, and to allow him to keep the residue;—Held, (affirming the judgment of the Court of Session), That the discharge was not binding, and that the client was entitled to recover payment of the balance of the debt.

'a sequestration, therefore, applied for, and the first deliverance recorded, before the application for a commission, must form a mid-impediment to the effect of preventing the issuing of the commission itself, or at least prevent it from striking against the sequestration. That the retrospective effect given to a commission duly issued, with reference to the date of the act of bankruptcy, was not intended for such a case, but merely to prevent fraudulent or improper conveyances by the bankrupt himself, to the prejudice of his creditors; but that a sequestration was not a conveyance to the prejudice, but for the benefit of creditors, being the appointment of a system of judicial distribution for the behoof of all concerned. That a retrospective effect of the same kind was given in Scotland to a sequestration, which cut down or equalised all private diligence by creditors, and entitled the trustee to set aside all conveyances for payment of debt within a certain period previous to its date; but that no one had ever thought of maintaining, in a competition between a Scotch sequestration and an English commission of bankrupt, that the effect of the judicial assignment in Scotland was to draw back to the period within which secret or fraudulent conveyances might be set aside; that bona fide transactions with the bankrupt, in the course of trade, were saved in both countries within the retrospective period; and that therefore, on all these grounds, the competition in this case would have been regulated by the date of the first sentence of the Court in either country, and not by the date of the act of bankruptcy, had it been a case in which otherwise there were grounds for supporting the title of the English assignees.'

May 28. 1824.

2D DIVISION.  
Lords Reston  
and Cringletie.

THE York Buildings Company, with the view of raising money, issued bonds in 1724, each for L. 100. Of these six were acquired by Richard Crop, merchant in London, so that he thereby became a creditor of the Company for L. 600, with interest from and after 1724. Soon thereafter the affairs of the Company became embarrassed; certain proceedings were adopted by the creditors in the Court of Chancery in England; and an action of ranking and sale of their estates, situated in Scotland, was raised in 1752. In 1768 Crop assigned his bonds in trust to William Ward, solicitor in London, and the late John Russell, writer to the signet, who in the same year obtained a decree of adjudication for the accumulated sum, principal and interest, amounting to L. 1687. 11s. The funds of the Company being insufficient to meet the extensive claims of their creditors, an arrangement was proposed, by which the Company stipulated, that, on payment of certain sums to the creditors, the latter should renounce all claim against the Company, and reconvey to them the whole estates which had been attached by their diligence. A deed was accordingly executed on the 2d of June 1786, called the *Crown and Anchor Agreement*, (from having been made at the Crown and Anchor Tavern in London), but which was at a subsequent period abandoned. The late John Taylor, writer to the signet, acted as agent in Scotland for several of the creditors, and Thomas Lloyd, an attorney in London, acted for them in England; a Mr Andree was the solicitor employed in London by Crop. The Crown and Anchor Agreement had been brought about by Taylor and Lloyd, and it was subscribed by Crop. In 1787, and during the subsistence of that agreement, an assignation of Crop's bonds, (which were held in trust by Ward and Russell), was, with his consent, executed by these gentlemen, *ex facie* absolutely in favour of Taylor. In virtue of this assignation, Taylor, with consent of the Company, obtained an interim warrant in the process of ranking and sale for L. 2154. 15s. 10d. Of this sum L. 1900 were paid by Taylor to Crop, and the balance was retained, with Crop's consent, on account of expenses. Thereafter the Company, alleging that Taylor had acquired the bonds on their behalf, presented a petition and complaint to the Court against him, and he thereupon executed a deed, declaring that he held them in trust for Crop. The creditors and the Company having quarrelled, and the Crown and Anchor Agreement having been abandoned, a new arrangement was proposed in 1792, which was carried into effect, and made into

May 28, 1824.

the form of a deed on the 12th of April, called the *General Agreement*. By this deed the Company, on being discharged of the claims against them, agreed to give up the whole of their estates to the creditors, to be divided among them in such manner as they thought fit; and, on the other hand, the creditors entered into a submission, as among themselves, to certain arbiters, in order to ascertain the amount of their respective debts and claims of preference over the estates. On the same day certain of the creditors who had acceded to the *General Agreement*, entered into an arrangement among themselves, called the *Restrictive Agreement*, by which, with the view of accomplishing an immediate and equal division among themselves, of the funds which they might recover in virtue of the decrees to be pronounced in the submission, they agreed to lay aside all claim of priority or preference inter se; that each should restrict his debt to a modified sum, which each should be entitled to draw out of the common fund thus created; and that if there was any surplus, it should be equally divided among them, in proportion to their respective debts; but declaring that, in a question with the creditors who did not accede to the *Restrictive Agreement*, their debts and preferences should be held effectual to the fullest extent. To this deed Crop acceded, there being still due to him, over and above the payment which he had received, a sum which, under this arrangement, he restricted to L. 250.

Proceedings then took place before the arbiters in relation to the several claims, and a sum was found due to Crop of L. 1445. 5s. 10d. as at Whitsunday 1794. For payment of L. 1000 of this sum, an interim decree was issued by the arbiters; and Taylor, who acted as Crop's agent and attorney, then presented a petition to the Court, in the process of ranking and sale, and obtained a warrant on the fund in medio for payment of L. 1000, with interest. In order to uplift this money, he prepared a new power of attorney by Crop in his favour, in which the proceedings were recited, and, particularly, the amount of the sum for payment of which the warrant had been got. Taylor was also agent for a person of the name of Skutt, and for a great number of the acceding creditors to the *Restrictive Agreement*; and, on the 4th April 1794, he wrote to Mr. Andrew the following letter, and transmitted to him at the same time the power of attorney to be executed by Crop:—'I informed you in the course of the Session, that I meant to apply for Crop and Skutt's money. I have accordingly made this application, and succeeded, and got an order for payment,



May 28. 1824. ' which I hope will be complied with soon ; but in order to enable me to receive, I wish to have the enclosed powers of attorney executed, which I beg you will lose no time in getting accomplished, and I shall then receive and remit. The sums subscribed to the agreement, in respect of these debts, was for Mr Crop L. 950, for Mr Skutt L. 960. The sums in these warrants exceed a little these sums, and the excess will go to the general trust ; and out of these subscribed sums, these gentlemen will please say what they are to allow for expense and trouble in bringing the business to such a fortunate issue for them, and at such a risk, expense, and trouble. You know what others have done in similar circumstances. You know, also, that both of these gentlemen assigned their debts to me absolutely, when I made them the last payment ; but as the debts have far exceeded what we had then in view at the time of that transaction, and circumstances are totally changed, I neither have nor intend to make any use of that assignment, but leave it entirely to the feelings of gratitude of those creditors to do as they think proper in respect to the money now to be paid. Only say how you settle, and I shall remit accordingly. You know the whole business ; but in the mean time, as it will take some little time to pave the way to prepare to get the money, let me entreat you to lose no time in getting the powers executed and returned.'

The power of attorney was executed by Crop on the 5th June 1794, and at the same time he transmitted through Andree the following letter to Taylor, which, with the exception of the sum and his signature, was in the hand-writing of Andree :—' I agree to accept and receive of John Taylor, Esq. the sum of L. 500, in full of all money due, and to become due, on the debt of the York Buildings Company to me, and to allow the remainder, and all the interest, if any, to come for costs and trouble.' It afterwards appeared that the total amount of the account due to Taylor, in regard to this matter, was only L. 18. 5s. 2d. ; but of which no information was given. The L. 500 were paid to Crop on the 28th of August following, and the remainder of the debt was afterwards recovered by Taylor, who retained it to himself. Crop died in 1796, and was succeeded by the respondent, Long, as his heir-at-law, who was then, and for several years afterwards, in minority. In 1811 Taylor died, and his successor was his eldest son, the appellant, John Taylor. An action was then brought by Long against the appellant, concluding for an accounting in relation to the sums which had been recovered by his father,

over and above the L. 500. In defence, the appellant rested on the letter, which he alleged was an effectual discharge by Crop of all further claim against his father. In answer to this, Long maintained, that the letter had been granted under the influence of such misrepresentation and concealment as amounted to deception on the part of Taylor; more especially seeing that he was acting as the agent of Crop, and therefore the letter could not be binding upon him. On the other hand, the appellant alleged, that Crop was fully aware of the whole circumstances, both from the terms of the power of attorney, and of a printed schedule of the debts which had been circulated among the creditors. Long then brought a reduction of the letter, which was conjoined with the process of accounting; and after various proceedings, Lord Reston, in respect 'of the terms of the letter of the late Mr Taylor to the late Mr Andree of 4th April 1794,—that a printed schedule of the sums to which each creditor was entitled seems 'previously to have been distributed,—of the terms of the deed 'under reduction,—of the death of the original parties concerned, 'and long acquiescence before the present action was raised,' assailed the appellant. A representation having been lodged by Long, and the case having been remitted to Lord Cringletie, on the death of Lord Reston, he adhered to the interlocutor, 'In 'respect that by the power of attorney, dated the 5th June '1794, the same date with the letter of the late Richard Crop 'under reduction, it appears, or must be held, that he was aware 'that a warrant had been obtained from this Court for a dividend 'on his debt of L.1000; and yet knowing that, he agreed to 'accept L. 500, and give up the rest to Mr Taylor; and that 'Mr Crop died without challenging this act of munificence.'

Another representation was then given in by Long, on advising which, Lord Cringletie, for the reasons explained in the following note, decerned in the reduction, and found the appellant 'liable 'to account for his father's intromissions, as attorney for the deceased Richard Crop, Esq.; but that, in accounting therefor, he 'is entitled to credit for L. 500 paid to the said Richard Crop 'on the 19th of August 1794; and also to any expenses laid out 'by the late Mr John Taylor in recovering the money due to 'said Richard Crop, with a just recompense for his trouble; and 'appointed the defender (appellant) to lodge in process an account of such expenses and trouble.'

The note alluded to, as containing the opinion of his Lordship, was in these terms:—'In these answers for Mr Taylor it 'is argued strenuously, that when a client challenges a settle-

May 28. 1824.

May 28. 1824. 'ment made with his attorney, for the purpose of setting it aside,  
' it is necessary that he should prove imposition and extortion,  
' in order to support the action; and to this the Lord Ordinary  
' readily assents; but he considers that, in our law, as he sup-  
' poses in that of every other civilized country, there is the known  
' maxim, that there may be dolus in re ipsa; that the settlement  
' with the attorney is of such a nature as to require explanation  
' to support it; and the Lord Ordinary confesses, that the pre-  
' sent appears to him to be of that description.

' That Mr Crop should, by the arbiters, be found entitled to  
' L.1445. 5s. 10d.; that, in the mean time, in March 1794, he should  
' have actually obtained a warrant for L.1000, with interest, at  
' the rate of  $4\frac{1}{2}$  per cent, from Whitsunday 1793, with a right  
' to a dividend which was afterwards, viz. in 1802, drawn to the  
' amount of L.82. 5s. 6d.; and that Mr Crop should have accept-  
' ed of L.500 in full, leaving to Mr Taylor all the rest for costs  
' and trouble, seems so strange and unaccountable a settlement  
' between Mr Taylor, a Scotch writer, and Mr Crop, an English  
' banker, unacquainted with our laws and customs, and admitted  
' to be a stranger to Mr Taylor, as to constitute an apparent  
' dolus in re, loudly calling for an explanation from Mr Taylor  
' how it came to pass.

' The Lord Ordinary cannot consider the English cases quot-  
' ed as precedents, similar to the decisions of this Court, but he  
' regards them as great authorities, founded on principles of ge-  
' neral law and expediency, and sound sense of morality; because  
' almost in every case between client and attorney, the latter be-  
' ing possessed of all the knowledge, both of the law and of the  
' facts, and being, with this advantage, placed in a confidential  
' situation, is in duty bound to make full disclosure of both to his  
' constituent, to enable him to judge for himself in making a  
' settlement of matters between them: and, as a consequence of  
' this, if the attorney be detected in the least misrepresentation of  
' any material circumstance, he ought not to be suffered to derive  
' the advantage of any settlement made under any such decep-  
' tion, farther than a due recompense for his costs and trouble.  
' Accordingly, in the case of *Harris v. Trementhere*, Lord Eldon  
' sustained the transactions brought under challenge, but declar-  
' ed, that "if he could find the slightest hint, that the defender  
' laid before the testator an account of the value of the premises  
' that was not perfectly accurate, that would induce me to set  
' them aside, whatever the parties intended, upon the general  
' ground, that the principal never could be safe if the agent could

"take a gift from him upon a representation that was not most accurate and precise." May 28. 1824.

' The same doctrine is laid down by the great Lord Hardwicke in *Walmsley v. Booth*; and the Lord Ordinary thinks, that the Scottish nation is justly entitled to as much security in their dealings with their men of business as are their southern neighbours; but that principles ought to be adopted and established which lead to purity of manners in practitioners of the law, and to maintain that consequent honourable respect with which they ought to be regarded by their country.

' When the Lord Ordinary last advised the cause, he proceeded on these ideas: he called on Mr Taylor to produce a power of attorney alluded to in his father's letter to Mr Andree, 4th April 1794; and Mr Taylor having produced that power which was executed by Mr Crop, and specially mentioned that his father had obtained a warrant from this Court for L. 1000, the Lord Ordinary thought that Mr Crop was sufficiently informed of his having a right to L. 1000, and accepted of L. 500 in full knowledge of the circumstances of the case, and therefore pronounced the interlocutor brought under review; but he confesses that, on a reconsideration of the whole, added to the late Mr Taylor's account, produced with the representation, of the expenses of obtaining Mr Crop's warrant, he has altered his opinion.

' Mr Taylor, in numerous passages of his answer to the representation of Mr Long, presses on the Lord Ordinary's attention, that the late Mr Taylor was not in the confidential relation to Mr Crop of attorney and client—that he had not even a right to address Mr Crop, Mr Andree being interposed between them, to whom Mr Taylor communicated every thing; and, consequently, that Mr Crop having been shielded from imposition by the knowledge and experience of Mr Andree, the principles of the English cases do not apply to the present.

' Now, in the *first* place, Who was this Mr Andree? A person of the same description as Mr Lloyd, a confederate of the late Mr Taylor, agent for some creditors who did not employ Lloyd, acting on the same plan as did the latter, and associated with Mr Taylor in dividing equally between them what could be obtained from the creditors;—such a person was no shield nor protection, but, on the contrary, equally interested as Mr Taylor in preventing a full disclosure of facts necessary to guide his client in his allowance for his trouble.

' But let it be supposed that Mr Andree was a disinterested

May 28. 1824. ' person, it will scarcely be denied, that misrepresentation to him  
' was just the same as to Mr Crop: and here the Lord Ordinary  
' cannot omit to bring into view the great facts which have in-  
' duced him to alter his opinion.

' Immediately after Mr Taylor had obtained the warrant for  
' L. 1000, with interest from Whitsunday 1793, he wrote to Mr  
' Andree, communicating that he had obtained a warrant for  
' L. 950—and a little more, which little amounted to L. 95—in  
' which he desired Mr Andree to get Mr Crop to say what sum  
' he would allow to his agent, for his trouble in obtaining the  
' warrant. To a certain extent this was a misrepresentation; but  
' it is of little importance, as will appear in the sequel. Perhaps,  
' however, there ought to have been no difference in the mode of  
' dealing in this case, more than in any other in which Mr Tay-  
' lor would have sent his account to his employer, thereby shew-  
' ing the extent of business and cost, and left him to insert a sum  
' for trouble. But what did Mr Taylor instruct Mr Andree to  
' inform Mr Crop, in order to enable him to fix the allowance?  
' He first says, that Mr Crop will judge what he is to allow "for  
' expense and trouble in bringing the business to such a favour-  
' able issue for them, (viz. Mr Crop, and another creditor called  
' Skutt), and at such risk, expense, and trouble." He then tells,  
' that both of these creditors had assigned their debts absolutely  
' to him; that he neither had made, nor intended to make, use of  
' that assignment; but, says he, "leave it entirely to the feelings  
' of gratitude of those creditors to do as they think proper, in  
' respect of the money now to be paid to them."

' On reading this letter alone, no man can doubt Mr Taylor's  
' intention was to lead Mr Crop to believe that his warrant had  
' been obtained with great risk, expense, "and trouble;" and  
' that Mr Taylor had abandoned an absolute assignment of the  
' debt in his favour out of mere generosity to Mr Crop, thereby  
' imposing on him a large debt of gratitude; whereas there was  
' not the least risk; and the account of expenses now produced,  
' which is not pretended to have been ever communicated to Mr  
' Andree or Mr Crop, amounting to L. 18. 5s. 2d. part of which  
' is a charge of L. 5. 5s. for trouble, proves the extent of the  
' trouble and expense necessary in Mr Crop's case. And as to  
' Mr Taylor's abandoning the assignation in his favour, he did  
' so in consequence of a complaint to the Court by the late Mr  
' Robert Mackintosh, in name of the York Buildings Company,  
' against him, for purchasing debts of the Company in his own  
' name while acting for them. It was therefore an act which he

‘ could not avoid, and for which no gratitude was due to him. May 28. 1804  
 ‘ Nevertheless, under the representation made to Mr Andree; and  
 ‘ by him to Crop, of the gratitude for his payment, and the  
 ‘ risk, expense, and trouble in obtaining the money, Mr Crop  
 ‘ granted the letter under challenge, agreeing to accept of L.500  
 ‘ in full of all the money due, and to become due, on the debt  
 ‘ of the York Buildings Company to me; and to allow the re-  
 ‘ mainder, and all interest; if any, to come for costs and trouble.”  
 ‘ The words “interest, if any,” shew that Mr Crop did not per-  
 ‘ fectly understand the nature of the warrant, as the money is  
 ‘ declared to bear interest at  $4\frac{1}{2}$  per cent from Whitsunday 1798;  
 ‘ and even afford room for suspecting that he signed the power  
 ‘ without reading it; but laying that aside, it is plain, that even  
 ‘ according to Mr Taylor’s own statement, he drew for costs and  
 ‘ trouble,

L.450	0	0
‘ A year’s interest on L.1000, at $4\frac{1}{2}$ per cent,	45	0
‘ And the last dividend of 1802, besides interest,	82	5

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L.577 5 6

‘ Had Mr Crop been aware that he was under no debt of gra-  
 ‘ titude—that there was no risk—and that the trouble and ex-  
 ‘ pense of procuring the decree and warrant for his debt was  
 ‘ absolutely trifling,—the Lord Ordinary, with much deference,  
 ‘ conceives it to be incredible, that Mr Crop could have given up  
 ‘ more than one-half of his debt; but whether this idea is cor-  
 ‘ rect or not, is of less importance. It is enough that induc-  
 ‘ ments were held out to Mr Crop to guide him in the allowances  
 ‘ to his attorney, which were not accurate, and by which he must  
 ‘ be held to have been misled.

‘ Much has been said about the lapse of time, and the long ac-  
 ‘ quiescence since the settlement; but in this instance, as in every  
 ‘ one of the sort, no great stress is due to that circumstance. In  
 ‘ occult cases, it is difficult to get at the truth; and surely that  
 ‘ difficulty ought not to confer any benefit on the person who de-  
 ‘ rives advantage from having hidden and misrepresented it, when  
 ‘ accident happens to produce a disclosure. If it was wrong  
 ‘ in the late Mr Taylor to act as he did, it is nowise removed  
 ‘ by the lapse of time, and the difficulty of discovery. Besides,  
 ‘ that the late Mr Crop died soon after the transaction, it is said  
 ‘ in 1796, leaving the respondent, Mr Long, his heir, in minority,  
 ‘ who, of course, could know nothing of this transaction.

‘ The late Lord Reston was also moved by the idea of a sche-  
 ‘ dule having been circulated among the creditors, containing a

May 28. 1824. ' list of the sums to which each was entitled, which his Lordship  
' thought had conveyed sufficient information to Mr Crop of the  
' extent of his rights. But in the after pleadings, that schedule  
' was admitted to be of no importance whatever, and was not even  
' pretended to have been sent to that gentleman;—at any rate,  
' it is certain that it may now be laid out of the question, because  
' it is established, that a power of attorney was sent to, and sub-  
' scribed by Mr Crop, in which the amount of the sum for which  
' warrant had been obtained in his favour, was specified. To  
' that extent, therefore, he was informed; but the Lord Ordinary  
' has fully explained his reasons for considering that the benefit  
' of such information was annulled by contemporary misinforma-  
' tion.' Against this judgment the appellant reclaimed to the  
Court, but their Lordships, on the 8th June 1821, adhered.\*

He then entered an appeal to the House of Lords, in support of which he maintained, That as, from the desperate state in which the affairs of the York Buildings Company had been at one time placed, few of the creditors expected to realize any part of their debts at all; and as funds had been made effectual by his exertions, and the measures suggested by him; and as Crop was fully aware that he was indebted to him for having obtained for him, first the L. 1900, and thereafter the warrant for L. 1000; and as he had been informed of the amount for which that warrant had been granted, and was aware of the whole circumstances; it was plain that he had considered himself under a great obligation of gratitude to Mr Taylor, and on that principle had made over the residue of the debt to him, not merely on account of the trouble which he had experienced in procuring that warrant, but of so unexpectedly obtaining payment of so large a part of his debt; and, therefore, it was not relevant to allege, that the account of the expenses incurred in relation to that warrant had not been laid before him.

To this it was answered, That as Taylor stood in a confidential relation to Crop, (being his man of business), it was his imperative duty to have made the latter fully aware of the whole circumstances in regard to the matter committed to him; and that as the law was extremely jealous of any advantage or profit being taken by an agent or attorney from his employer, beyond that to which he was legally entitled, it was sufficient to set aside the transaction, that Taylor had represented that he had incurred great risk, expense, and trouble, in bringing the matter to what

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\* See 1. Shaw and Ballantine, No 69.

he denominates 'such a fortunate issue,' when, in truth, he had incurred no risk, and little trouble, and the whole expense amounted to only L. 18. 5s. 2d.: That it was his duty to have informed Crop that such was the amount of the account, which he did not do; and that he ought further to have mentioned, that the sum for which decree had been given by the arbiters was L. 1445. 5s. 4d., whereas he only communicated to him, that he had got a warrant for L. 1000; and therefore, as there was such a concealment and misrepresentation as had the effect to lead Crop to suppose that a greater risk, expense, and trouble, had been incurred, and a smaller sum awarded, than was consistent with the fact, the obligation had been obtained by means of deception, and therefore could not be effectual. The House of Lords 'ordered and adjudged, that the appeal be dismissed, and' 'the interlocutors complained of affirmed.'

May 28. 1894.

**LORD GIFFORD.**—My Lords, This is a proceeding by the representatives of Mr Crop, one of the individual creditors of the York Buildings Company, to recover from Mr Taylor's representatives, or to bring him to account for a large sum of money received by him as a sum due to Mr Crop under the Restrictive Agreement, and out of which the sum of about L. 500 was deducted by Mr Taylor, as a compensation for his trouble. My Lords, in entering upon those observations I have to make upon this case, I would state to your Lordships, that no case in which I have had the honour of rendering my humble assistance to your Lordships has given me more anxiety than this case. I have been looking it over and over again; and undoubtedly, my Lords, though, in the result, I have at last come to the conclusion that I think the interlocutor right, yet I do assure your Lordships, that I have come to that conclusion with considerable difficulty, and with considerable hesitation.

I will not trouble your Lordships at any great length on the circumstances of this case. Mr Crop was a creditor to a very considerable amount of this York Buildings Company;—he was applied to, I believe, just about the time of the Crown and Anchor Agreement, or shortly after, to come into that agreement: at that time there was an assignment, which Mr Taylor afterwards chose to state was an assignment for his benefit; and I advert to that particular circumstance, because I think it forms a very material ingredient in this case, with respect to the ultimate settlement which took place between Mr Taylor and Mr Crop, through the medium of Mr Andree, who was the agent of Mr Crop. My Lords, it is sufficient to state, that under the Restrictive Agreement, Mr Crop was to receive L. 950, his debt being considerably more. It appears that, in the year 1794, a letter was written by Mr Taylor to Mr Andree, who was a gentleman concerned in London for Mr Crop, which is set out in page 3. of the appellant's case, in which he says,—'I informed you in the course of the Session, that I meant to



May 28. 1824. ' apply for Crop and Skutt's money. I have accordingly made this application and succeeded, and got an order for payment, which I hope ' will be complied with soon; but in order to enable me to receive, ' I wish to have the enclosed powers of attorney executed, which I ' beg you will lose no time in getting accomplished, and I shall then ' receive and remit. The sums subscribed to the agreement, in respect of these debts, was, for Mr Crop L. 950, for Mr Skutt L. 960. ' The sums in these warrants exceed a little those sums, and the excess will go to the general trust,—(what the excess was, he does not condescend to state in the letter);—' and of these subscribed sums, ' these gentlemen will please say what they are to allow for expense ' and trouble, in bringing the business to such a fortunate issue for ' them, and at such a risk, expense, and trouble. You know what ' others have done in similar circumstances. You know, also, that ' both of these gentlemen assigned their debts to me absolutely, when ' I made to them the last payment; but as the debts have far exceeded ' what we had then in view at the time of that transaction, and circumstances are totally changed, I neither have nor intend to make any ' use of that assignment, but leave it entirely to the feelings of gratitude of those creditors to do as they think proper in respect to the ' money now to be paid. Only say how you settle, and I shall remit ' accordingly. You know the whole business; but in the mean time, ' as it will take some little time to pave the way to prepare to get the ' money, let me entreat you to lose no time in getting the powers ' executed and returned.'

My Lords,—The only part of the power of attorney which was executed by Mr Crop, in consequence of this letter, to which I will call your Lordships' attention, is the recital; because unfortunately, on that recital, it being set up by Mr Taylor that this assignment was made to him absolutely, on the contrary the recital treats this assignment as an assignment in trust for Mr Crop, and that Mr Taylor had been acting as his attorney in the course of that transaction; it authorizes Mr Taylor to receive the sums which were due to him in respect of this debt, and to do every thing necessary for the receipt of those sums. It appears, that on the 5th of June 1794 Mr Crop signed this receipt,—(his Lordship then read the receipt, see p. 236.) And, my Lords, I cannot but call your Lordships' attention to one circumstance,—the fac simile of this instrument has been set out in some of the proceedings, and the sum of L. 800 appears to have been filled in, in Mr Crop's hand-writing. Your Lordships will see, that the rest of the instrument was evidently drawn up,—by whom, does not appear,—but drawn up previously, and produced to Mr Crop, for him to fill up the sum. Mr Crop is dead,—Mr Taylor is dead,—and the representatives of Mr Crop have brought this action, which is, in its nature, neither more nor less than an action to make Mr Taylor's representatives to account fairly for what he has received, not touching the compensation he ought to receive for the trouble he has had, but denying that they are bound by this receipt.

My Lords,—Undoubtedly, in this case, if the evidence had shewn that Mr Crop did this with the full knowledge of his situation, and as an act of bounty to Mr Taylor for the services rendered by him, there can be no doubt that Mr Crop would have no right to require it again: but the question is, whether there is not sufficient evidence to shew that he was not fully apprized of the situation in which he stood; and whether it was not Mr Taylor's duty, not only as his attorney, (for his attorney he was), but as a trustee, to disclose to Mr Crop the real situation in which he stood, and the amount of the trouble and expenses really incurred by him, before he could desire Mr Crop to make him this present? Now, my Lords, it is upon that point, that after, as I have already stated, great anxiety,—after having taken considerable pains,—after the fullest investigation of this case, I think the Court of Session have finally come to the right conclusion. In this case, therefore, I apprehend there will be nothing more to be done, than to affirm the interlocutor pronounced in the Court below.

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*Respondent's Authorities.*—15. Vesey, Jun. 38.; 2. Atk. 27. et seq.; 14. Vesey, Jun. 19.; 9. Vesey, Jun. 232.; 6. Vesey, Jun. 636.; 2. Dow, 269.

C. BERRY—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No. 46.*)

JOHN and GEORGE TAYLOR, Appellants.—*Jeffrey—R. Bell.* No. 35.

ARCHIBALD SWINTON, W. S. Respondent.—*A. Wood.*

*Slander—Reparation.*—Circumstances in which (affirming the judgment of the Court of Session) an action of damages, founded on alleged slanderous expressions made use of in judicial proceedings, was sustained.

Mr ARCHIBALD SWINTON, writer to the signet, having been employed as agent for some of the creditors of the York Buildings Company, in the various proceedings that took place in Scotland for the division of their funds; and the late Mr John Taylor, writer to the signet, having been employed in the same capacity for other creditors—Mr Swinton, in 1811, and after the death of Mr Taylor, published a pamphlet or statement, addressed to the creditors in general, in which he represented, that Mr Taylor was accountable to them for large sums; and in which, after suggesting that the creditors should take joint measures for bringing Taylor to an account, he represented, that the creditors need not be afraid that they would run any risk of involving themselves in any unprofitable expense, for he begs it to be distinctly understood, that the con-

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June 4. 1824. 'cunning creditors are not to be called upon for any advance, but merely to contribute out of their future dividends in proportion to the dividends of the principal creditors.' At the same time he inserted advertisements in various newspapers, informing the creditors that there were still dividends due to them, and recommending them either to apply to himself or to Mr Mundell, solicitor in London; and it was also alleged, that he sent copies of the pamphlet to all the creditors, and caused it to be circulated extensively throughout the country. The grounds on which it was stated in this pamphlet that Taylor was accountable to the creditors was, that he, together with a Mr Lloyd, a solicitor in London, (who had also been employed as agent for several of the creditors), had been guilty of a long continued and systematic series of frauds, by which they had appropriated to themselves upwards of L. 130,000. Taylor being dead, the appellants, who were his sons, presented a petition and complaint to the Court of Session against Mr Swinton, complaining of this pamphlet, and praying for censure, fine, and damages. This complaint was met by defences, both on the competency and on the merits—Mr Swinton alleging that a summary proceeding was incompetent, and that his statements were well founded; but that the Court could not enter into an investigation without doing prejudice to various actions which had been instituted, and were in dependence against the representatives of Taylor, for restitution of the funds intromitted with by him. After a great deal of procedure, their Lordships dismissed the complaint, 'in respect that the Court cannot hoc statu investigate the facts contained in Mr Swinton's statement;' and they found him entitled to expenses, but subject to modification.

In the course of these proceedings, language of a very intemperate nature had been made use of by the appellants against Mr Swinton; and it was alleged, that he had retorted in a mode equally as offensive. After the petition and complaint was dismissed, (and which it was alleged by Mr Swinton had been extensively circulated by the appellants extrajudicially), he brought an action of damages against them, in which he set forth, 'that the defenders, contriving, and most wickedly and maliciously intending to ruin, if they could, the pursuer's character and reputation, not only with his employers, the creditors of the York Buildings Company, but with the Lords of Council and Session, and with the public in general, and to bring him into public infamy and disgrace, by causing it to be suspected and believed, that, by preparing and communicating the statement

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'aforesaid, he had been guilty of maliciously and wantonly dis-  
 'seminating publicly and openly what he knew to be false and  
 'unfounded calumnies upon the character of their father, the  
 'said John Taylor, deceased; and of likewise, thereby, for his  
 'own emolument, inviting and encouraging the said creditors to  
 'institute against them, the said defenders, what he knew to be  
 'unjust and groundless actions, upon the improper and invidi-  
 'ous offer, that if he were employed to conduct them, the parties  
 'should be put to no expense if he did not succeed: And the  
 'said defenders further most wickedly and maliciously intending  
 'and devising to induce, as well the said creditors to dismiss him  
 'the said pursuer from their employment, as the Lords of Coun-  
 'cil and Session to censure and punish him as guilty of the of-  
 'fences aforesaid: And the said defenders, in the last place, most  
 'illegally and unjustly designing to stifle all inquiries into the  
 'state of accounts betwixt their said father and his employers,  
 'the said creditors of the York Buildings Company, and expect-  
 'ing and trusting, that if they could destroy or injure the pur-  
 'suer, they would thereby for ever discourage and intimidate  
 'the creditors, or any person to be employed for them, from at  
 'any time inquiring after their rights;—had the audacity and  
 'temerity to compose, print, and publish, or cause to be com-  
 'posed, printed and published, a most false and injurious libel  
 'against the pursuer, under the shew and form of a legal pro-  
 'ceeding, against him, viz. under the shew and form of a petition  
 'and complaint, addressed and presented in their names to the  
 'Lords of Council and Session; in which petition and complaint  
 'the said defenders did most falsely, wickedly, and maliciously,  
 'set forth a variety of injurious, malicious, and libellous matter  
 'against the pursuer, and of and concerning him, his conduct as  
 'an agent of the creditors of the York Buildings Company, and  
 'of and concerning the information given in said statement to  
 'the creditors; describing him as a propagator of falsehood,  
 '—an incendiary of litigation,—a mendicator of employment,—  
 'an attorney prowling for prey, and a nuisance to society; and  
 'representing him as unfit for the employment, and unworthy of  
 'the confidence of the creditors; as a disgrace to the profession to  
 'which he belongs, and as having behaved in so reprehensible  
 'and barefaced a manner, as to merit being suspended from the  
 'exercise of his profession; with many other opprobrious, scur-  
 'rilous, and injurious epithets and accusations, all intended to  
 'vilify, calumniate, defame, and traduce him, the said pursuer,  
 'as will be made manifest by reference to the said petition and

June 4, 1824. ' complaint from beginning to end. By means of which petition  
' and complaint, by the passages therein before quoted, and  
' others of similar import, to be pointed out and referred to in  
' the course of the proceedings to follow hereupon, and by pub-  
' lishing, dispersing, and circulating copies of the said petition  
' and complaint in London, Edinburgh, and other places, among  
' all and sundry who chose to receive them, and to which they  
' were invited by notices advertised in the public newspapers,  
' the said defenders traduced, defamed, and vilified the said pur-  
' suer, and used every endeavour to bring him into discredit and  
' contempt, as well with the said creditors of the York Buildings  
' Company, as with the public at large: In consequence where-  
' of, the pursuer has not only suffered, or might have suffered  
' materially in his character and reputation, to his great patri-  
' monial loss, but was likewise put to a great deal of trouble, loss  
' of time, and expense, in defending himself against this most  
' injurious, calumnious, ill-founded, and malicious complaint;  
' and is therefore entitled to recover from the said defenders  
' exemplary damages in solatium and reparation of the great  
' injury thus committed against him. Therefore it ought and  
' should be found, by the decree of the Lords of Council and  
' Session, that the said defenders composed, printed, and pub-  
' lished the petition and complaint libelled on, or caused the said  
' petition and complaint to be composed, printed, and published;  
' and that the said petition and complaint contains a variety  
' of false, injurious, and libellous matter, to the great hurt and  
' prejudice of the pursuer's character and reputation, tending  
' to vilify, defame, and traduce him in the estimation of his em-  
' ployers and others; and thereby have been guilty of a gross libel  
' against him. And the same being so found and declared, the  
' said defenders ought and should be decerned and ordained to  
' make payment, conjunctly and severally, to the said pursuer, of  
' the sum of L. 5000 sterling, or of such other sum as our said  
' Lords shall be pleased to modify in name of damages and expen-  
' ses.' On the other hand, the appellants brought a counter action,  
founding on the matters alleged to be libellous in Mr Swinton's  
pamphlet, and also in his pleadings in regard to the petition and  
complaint, and in which they concluded for L. 10,000 of dama-  
ges. In defence, the appellants maintained generally, that as the  
expressions on which Mr Swinton's action rested had been made  
use of in judicio, they could not infer damages. After order-  
ing a condescendence by Mr Swinton, Lord Craigie found, ' That  
' the petition and complaint libelled on was, in substance as

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' well as in form, and in many of the circumstances attending  
 ' it, improper and highly injurious to the pursuer; and that  
 ' although, in the pleadings which followed on the pursuer's part,  
 ' there was much intemperance, and several improper expres-  
 ' sions, these cannot be considered as sufficient altogether to  
 ' deprive the pursuer of the redress that would otherwise have  
 ' been competent to him: That although the amount of the  
 ' redress thus due to the pursuer may be in some degree affected  
 ' by the ultimate result of the process now depending in Court,  
 ' in which the parties are interested either individually or pro-  
 ' fessionally, there must still remain a just claim to a certain  
 ' extent competent to the pursuer against the defenders for  
 ' damages, and for the expenses incurred in obtaining the same:  
 ' Therefore, and as the pursuer insists for an immediate deter-  
 ' mination, finds the defenders, conjunctly and severally, liable  
 ' in damages; modifies the same to 200 guineas, and decerns:  
 ' Finds the defenders also liable in expenses: and at the same  
 ' time assolizied Mr Swinton from the action at the instance of  
 ' the appellants, with expenses. Both parties having repre-  
 ' sented, the Lord Ordinary sisted proceedings till farther pro-  
 ' gress had been made in the actions by the creditors against the  
 ' appellants; and thereafter, the case having been remitted to  
 ' Lord Cringletie, and Mr Swinton having consented that the  
 ' relevancy of the appellant's action should be sustained, his Lord-  
 ' ship accordingly did so; and at the same time ' repelled the  
 ' objections of Messrs Taylors, defenders, to the relevancy of the  
 ' action against them at Mr Swinton's instance, for damages'.  
 ' And his Lordship expressed his opinion in the following note:—  
 ' It may be true and quite proper, that rash and injurious words,  
 ' either spoken or written, but particularly when spoken by an  
 ' advocate in the course of his pleading for his client, and when,  
 ' not irrelevant to the matter at issue, nor maliciously spoken or  
 ' written, should not be actionable; but the Lord Ordinary con-  
 ' siders, that even the character of a Counsel does not protect  
 ' him if malice be at the bottom; and the inductive cause of his  
 ' pleadings; and far less will the client himself be protected;  
 ' when he maliciously and falsely (indeed wilful falsehood im-  
 ' plies malice) instigates his Counsel to lay before a court of  
 ' justice a false and malignant charge against an individual; and  
 ' this is the doctrine quoted by Messrs Taylors themselves in  
 ' page 14. of their memorial.

' But this is just what Mr Swinton libels. He libels an injury;  
 ' and that this was inflicted by the Messrs Taylors contriving,

June 4. 1824. ' and most wickedly and maliciously intending to ruin, if they  
' could, the pursuer's character. Whether this be true or not,  
' the Lord Ordinary knows not, and it is not his province to try  
' it; but, if it be true, he considers it is of no consequence whe-  
' ther it was done in the course of judicial pleadings or not,  
' except, that being done in a court of justice, whose part it is  
' to protect the innocent, it is an aggravation of the offence.  
' And Mr Swinton further libels, that the injury was increased  
' by the defenders not even confining their libel to that Court,  
' but by their publishing it wherever they could.'

The appellants having reclaimed, the Court, on the 8th June 1821, adhered.\*

They then entered an appeal to the House of Lords, in which they maintained, that as the action which they originally raised against Mr Swinton, in the form of a petition and complaint, was undoubtedly competent, and had only been dismissed in *hoc statu*; and as that complaint rested upon the foundation, that the statements contained in Mr Swinton's pamphlet were false and malicious, and had been made for the improper purpose of inducing creditors to employ him to raise actions against the appellants, they were entitled to bring before the Court the various motives by which he had been influenced, and to characterize them and his whole conduct in language as strong as they thought fit, seeing that these motives were pertinent to the issue, which was, whether he had been guilty of propagating the libellous falsehoods, inciting parties to litigation, and mendicating employment; and that they were the more entitled to do so, as Mr Swinton not only attempted to maintain the truth of his allegations, and the justifiable nature of his conduct, but made use of expressions against them of a calumnious nature, which he must have been aware would not be submitted to, and could have the effect only to produce retaliation. They therefore contended, that at least so far as regarded the statements which had been made in *judicio*, and which had not been ordered to be expunged by the Court, and which must consequently be considered as having been held to be pertinent, and not liable to objection, the action at Mr Swinton's instance was irrelevant, and ought to be dismissed.—On the other hand, Mr Swinton contended, that as his charge against the appellants was, that under the pretence and semblance of a judicial proceeding, which had been dismissed, they had wickedly and maliciously slandered

\* See 1. Staw and Ballantine, No. 71.

him in the grossest manner, with the intention of ruining him in his profession and character; and as their statements were not pertinent to the issue, and it was averred by him that they had extrajudicially circulated the petition and complaint—the action was perfectly relevant; and, at all events, it was proper that it should be remitted to a jury, where, upon the facts being proved, the law would be laid down by the presiding Judges, as to whether they were slanderous and relevant to infer damages or not; and consequently the judgments complained of ought to be affirmed.

The House of Lords ordered and adjudged, 'that the appeal be dismissed, and the interlocutors complained of affirmed; and it is further ordered, that the cause be remitted back to the Court of Session, to do therein as may be just and necessary.'

*Appellants' Authorities*.—8. Bacon's Abridg. 199. 244, 245.; Hodson and Scarlett, 1818, (Barn. and Ald. 232.); 3. Dow, 377.

C. BERRY—A. MUNDELL,—Solicitors.

(*Ap. Ca. No. 47.*)

JOHN TAYLOR, Esq. Appellant.—*Jeffrey—Ro. Bell.*

No. 36.

JOHN RICHARDS and Others, Respondents.—*A. Wood.*

*Agent and Client—Retention.*—Circumstances in which (affirming the judgment of the Court of Session) a claim of retention by an agent of ten per cent on the sum recovered by him on behalf of clients, founded on an alleged agreement to that effect, was repelled; but a reservation made in his favour to claim any account of expenses which he might have against the clients.

THIS case was connected with those preceding, and arose out of the facts which are stated in No. 34. Several of the creditors of the York Buildings Company, who had acceded to the Restrictive Agreement, and who had employed the late Mr Taylor as their agent, raised an action against the appellant, as Taylor's representative, to recover payment of certain funds alleged to belong to them, and intromitted with by Taylor; and also a process of multiplepoinding in name of the appellant. In defence he contended, that the creditors, under the Restrictive Agreement, had consented that Taylor should be allowed ten per cent on the sums recovered by him. This the creditors denied, and the question therefore resolved into one of fact.

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Meadowbank.  
Lords Reston  
and Cringletie.



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The Lord Ordinary and the Court found there was no evidence of the appellant's allegation, and repelled the claim; and on an appeal the House of Lords found, ' That there is no agreement binding on the creditors, parties to the Restrictive Agreement, to allow the deceased John Taylor ten per cent for commission and trouble on the amount of the sums awarded or paid to these creditors, defenders in the process of multiplepounding: And with this finding it is ordered and adjudged, that the said interlocutor, so far as the same is complained of, be affirmed; but without prejudice to the claim of the pursuers in the process of multiplepounding, to have credit in the accounting for the different sums alleged by them to have been allowed to and retained by the said John Taylor, deceased, for his trouble and commission, upon his settling with the creditors respectively: And it is further ordered, that the cause be remitted back to the Court of Session, to do therein as shall be consistent with this judgment, and as shall be just.'

C. BERRY—A. MUNDELL,—Solicitors.

(*Ap. Ca. No. 50.*)

No. 37.

JOHN and GEORGE TAYLOR, Appellants.—*Jeffrey—  
Ro. Bell.*

WILLIAM KEITH, Esq. Factor for the York Buildings Company,  
and Others, Respondents.—*A. Wood—D. A. Blair.*

*Agent and Client—Fraud—Repetition.*—An agent having been employed to appear for a client in a submission, and to recover payment of part of a debt due to him, in virtue of bonds under which it appeared to be still resting owing; and having stated his case on that assumption, and obtained a decree-arbitral; and thereafter being made aware that the debt had been fully paid, but having no authority to reveal this, and having received payment of the money, and remitted it to another agent of the client, who paid part of it to the client, and agreed to pay the residue to other parties having interest; and it having been found that the decree-arbitral could not be reduced;—Held, (reversing the judgment of the Court of Session), that the agent was not liable in repetition to those from whom he had recovered payment.

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AMONG other creditors who claimed as creditors upon the estates of the York Buildings Company, which had been sequestrated, and of which a process of ranking and sale had been

brought, was Richard Mackelcan, who founded upon 19 bonds for L.100 each, dated in 1732. These bonds had been issued by the Company, with a view of raising money, at a time in which they were much embarrassed; and they had been pledged to a person of the name of John Lepper, in security of L.610, which he had advanced on the faith of them, with interest at five per cent. These bonds were not redeemed, and being transmitted by blank indorsations, they eventually came into the hands of Mackelcan, after passing through those of one King. In virtue of these bonds, Mackelcan, in 1778, obtained a decree of adjudication against the estates of the Company. By a judgment of the Court of Session in 1786, it was found, in regard to the deposited bonds, 'that in so far as the present holders, claiming on the said bonds, are indorseees or assignees for gratuitous causes, or representatives of those with whom they were originally pledged or issued as a security for money below the amount of such bonds respectively, it is competent for the creditors of this Company to object, that the present holders of such bonds can only be ranked for the money for which said bonds were originally pledged or deposited, or a proportion thereof, so far as still due.' At this time it was understood by the other creditors, that Mackelcan was a singular and onerous successor of the bonds held by him; and, therefore, that he was entitled to claim the full amount, which at this date amounted, with interest, to L.3378. 5s. 4d.; whereas on the supposition that he fell under the above principle, his debt would have amounted only to L.2500. He acceded to the *Crown and Anchor Agreement*, (see ante, No. 34.), and there limited his claim to L.2217. Accordingly, with consent of the Company, an interim warrant was, on the 11th March 1787, obtained in the ranking and sale for payment to him of L.3065. 16s. 6d. and of which there was paid to him L.2586. 16s. 10d. the residue being retained on account of his share of expenses. In this and other matters in regard to his claims upon the York Buildings estates, he employed, in Edinburgh, the late John Taylor, writer to the signet, as his agent; and, in London, Thomas Lloyd, solicitor there. On receiving payment of the above sum, Mr Taylor remitted L.2586. 16s. 10d. to Lloyd, who paid it to Mackelcan, by whom this receipt was granted:—'Received, the 4th day of October 1787, of Thomas Lloyd, Esq. the sum of L.2586. 16s. 10d. being principal and interest agreed to be accepted by me, for my York Buildings Company's bonds, after deduction of expenses; and I hereby consent to Mr Lloyd's executing such assignment

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June 4. 1824. 'on the remainder of the debt, as he shall see occasion.' This payment was more than sufficient to discharge the claim of Mackelcan, on the supposition that he was a representative or gratuitous assignee of Lepper, the party with whom the bonds had been pledged; but was not so on the supposition of his being a singular and onerous indorsee. The Crown and Anchor Agreement having been abandoned, the *General Agreement* and submission was entered into, and also the *Restrictive Agreement*, (see ante, No. 34.) to both of which Mackelcan became a party, and under the Restrictive Agreement he limited his claim to L. 720. As, however, the claims of the Restrictive creditors were to be made as in competition with the other creditors at their full amount, a claim was lodged for Mackelcan on that principle with the arbiters by Taylor, who there represented, that Mackelcan had purchased them upon the Stock Exchange of London, and consequently, that, being an onerous indorsee, he was entitled, under the judgment of the Court, (which was recognized as the established rule in deciding on the respective claims), to be ranked for the full amount of the bonds, with interest, under deduction of the sum which had been paid to him. This statement, it was not denied, was made by Taylor under the firm belief of its truth. Accordingly, the arbiters, on the 30th of August 1794, proceeding on the footing that Mackelcan was a purchaser, found that his claim was to be sustained at its full amount, so that he was entitled to draw L. 2892. 16s. 3d. Of this, however, as in a question with the creditors under the Restrictive Agreement, he could only receive L. 720—the balance being divisible among them pro rata. Taylor having communicated this decision to Lloyd, that person immediately wrote that a mistake had been committed, because Mackelcan had acquired the bonds, not as an onerous purchaser, but as the heir and representative of King, who again had acquired them in right of his wife, the daughter of Lepper, with whom they had been originally pledged for L. 610; and, consequently, as he had already got full payment, he was not entitled to receive any thing. The decree-arbitral was signed upon the 9th of September, and Mr Taylor did not receive Lloyd's letter till the following day. Under these circumstances Mr Taylor did not consider himself justifiable in communicating the mistake to the competing creditors, as he had no authority for doing so, either from Mackelcan or from the creditors under the Restrictive Agreement. Mackelcan having at this time died suddenly, Lloyd applied to his heir-at-law, and obtained from him an assignation to the debt

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in absolute terms in his own favour, and a power of attorney to Taylor to uplift the money. Under that power Taylor obtained payment of the money, and remitted it to Lloyd, who thereupon paid the L. 720 to the heir of Mackelcan, being the sum to which he had right under the Restrictive Agreement. With regard to the residue, he had previously written to Taylor, that 'I shall hold myself bound to distribute the surplus beyond the subscribed sum among the other creditors, parties to the agreement, who will not draw any thing under the decree of the arbiters.' About five years after these matters had occurred, and when some suspicion had been excited, Taylor communicated the circumstance to the common agent under the ranking and sale, who thereupon raised an action of reduction, against Mackelcan's heir, of the decret-arbitral, in so far as he was interested, and concluding also for repetition of the above sum. At the same time Mackelcan's heir brought an action of reduction of the assignment in favour of Lloyd, and of count and reckoning and relief, both against him and Taylor. These cases having come before the late Lord Meadowbank, his Lordship inter alia found, 'That it is admitted by Mr Lloyd, that owing to the failure on his part in communicating to the arbiters the fact that Richard Mackelcan succeeded Lepper, the pledgor, and King, the claimant in Chancery, for a restricted sum, titulo lucrativo, the arbiters were led to sustain that claim, which otherwise they would have found to have been already satisfied and paid by the transaction of October 1787; and that he, Thomas Lloyd, refrained from an immediate application to the arbiters on the subject, from the design of exercising the trust he held from Mackelcan, so as to distribute the money thus obtained in the same way as would have followed had the decree of the arbiters been corrected: Finds the pursuer, George Mackelcan, is entitled to see that the money recovered is thus applied by Mr Lloyd: Finds, that owing to the funds falling short, the creditors, parties to the agreement and submission, draw many per cents less than the amount to which the arbiters sustained their claims; and that the whole sum allowed by the decree of Mackelcan must fall greatly short of affording these creditors full payment of what they were entitled to: Finds, that the common agent has a title and interest to see that the money has been applied by Mr Lloyd, by their authority, or for their behalf, according to their respective interests; and that when he has received this satisfaction, he has

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‘ no further interest to insist in the present process : Therefore  
 ‘ ordains Thomas Lloyd to put in a special condescendence,  
 ‘ or account, how he has disposed of, or is ready to dispose of,  
 ‘ the money in question, conformably to the rights of the credi-  
 ‘ tors interested therein, and that in three weeks ; and supersedes  
 ‘ deciding as to the challenge of the pursuers’ assignment to Mr  
 ‘ Lloyd till that account is considered ; as also as to the effect,  
 ‘ quoad Mr Taylor, of the allegation that he failed to communi-  
 ‘ cate to the common agent the fact disclosed in Mr Lloyd’s let-  
 ‘ ter, received by him on the 16th September 1794 ; and hoc  
 ‘ statu finds it unnecessary to decide on the competency or merits  
 ‘ of the reduction of the decret-arbitral, and decret of ranking  
 ‘ and division following upon it.’ Mackelcan and the common  
 agent having reclaimed, the Court adhered, and refused the peti-  
 tion of the common agent as unnecessary.

The case having then returned to the Lord Ordinary, and the  
 question having been argued as to the liability of Taylor, (who  
 was now dead, and in whose place his son, the appellant, had  
 been sisted), Lord Meadowbank assoilzied him, and at the same  
 time issued the following opinion : ‘ In the ordinary case of an  
 ‘ agent, the late Mr Taylor would not only have been justifiable,  
 ‘ (but, had he acted otherwise, been blamable), for concealing  
 ‘ the nature of Mackelcan’s title to Lepper’s bonds ; and the  
 ‘ Ordinary has yet to learn, that an agent, who cannot be blamed  
 ‘ for his pleadings, is, in a civil action, to be sued as a delinquent  
 ‘ for taking payment or satisfaction, on account of his clients, of  
 ‘ the decree obtained by his clients in consequence of these  
 ‘ pleadings, though it seems chiefly on this point that the pur-  
 ‘ suers argue with seriousness. The Ordinary’s difficulty lay in  
 ‘ another quarter, in there appearing to be a sort of understand-  
 ‘ ing that Mr Taylor would have disclosed the fact, had he  
 ‘ learned it in time for the decret-arbitral to have been adjusted  
 ‘ to it without delay and inconvenience. But he has not seen any  
 ‘ thing like evidence of this understanding having been entertain-  
 ‘ ed by Mr Taylor, far less that he would have acted correctly  
 ‘ had he conducted himself according to such a view of his  
 ‘ powers. His general agency in the discussing of questions  
 ‘ where all were interested, and for the expense of which he was  
 ‘ paid by all, could not, it is thought, have warranted any such  
 ‘ proceeding. Some feeling of the influence of the Restrictive  
 ‘ Agreement, the Ordinary is apt to think, may have operated on  
 ‘ the minds of the agents, as sanctioning such an extraordinary

power. But this agreement had not been founded on in judicio, June 4. 1824. and the parties to it, as such, were unknown to the arbiters; so it plainly gave no authority to Mr Taylor's agency before them, as agent for individuals, to entitle them or competitors to expect or demand communications, otherwise unfit for agents to make.

That agreement, however, is extremely material in this cause, comprehending directly so large a proportion of the acceding creditors, and indirectly the principal creditor, Jones, who accepted a guarantee, unquestionably on the faith of it, and entered into a compromise as to that guarantee, contemplating, as it should seem, the very fund produced by Mackelcan's debt. Mr Taylor seems to have been satisfied with Mr Lloyd's promise to apply the fund, as in this view it should have been applied, and the common agent and Mr Swinton to have been equally satisfied, after all had been brought to light by Mackelcan's dissatisfaction. In 1800, when that happened, Mr Lloyd had sufficiency of fund here to ensure the most correct application to the creditors of the award to Mackelcan, and nothing was easier than to attach that fund; but, instead of attaching it, the Ordinary has occasion to know that he was put to much trouble, in March 1804, by the urging him, of all the agents, to get a division accomplished that session, whereby Mr Lloyd obtained very large sums from a division, out of part of which, it is said, the compromise to Jones was satisfied. The Ordinary observes, that the facts of this matter are not disputed in the memorial for the common agent and Mr Swinton; and therefore, since Mr Lloyd's undertaking was then known, and Mr Taylor's reliance on it being declared in Court, it is thought that these gentlemen must also have relied on it as sufficiently satisfactory, otherwise they would have taken the measures of security, instead of taking advantage of it for the benefit of particular clients. In short, as far as acting in judicio, Mr Taylor's conduct does not appear, for aught yet seen, to be actionable; and so far as acting ultra, there seems to have been a knowledge of the Restrictive Agreement, and a reliance on its efficacy, and a disposition to let the machine go on under Mr Lloyd's management, among all the agents, and to make use of it for their clients as occasion served; and to attack Mr Taylor's representatives now, on account of a sort of versans in illicito, and so bound to guarantee Lloyd's engagements, while, if they doubted, they themselves could have taken security at pleasure, can only be accounted for from new views being taken up, after a

June 4. 1824. 'lapse of years, while the notions upon which all had been acting had become faint or forgotten.'

To the above judgment the Court at first adhered, 'in respect of the former proceedings and interlocutors pronounced in this cause;' but thereafter, on the 19th June 1818, they altered, and found, that 'the respondents are liable in payment of the dividend in question, with interest thereof, together with the expenses of process;' and to this judgment they adhered on the 16th of February 1819. Immediately thereafter a new action was raised at the instance of the respondent, Keith, as factor on the estates of the Company, concluding for payment from the appellant and his brother, George Taylor, of the above sum, which was conjoined with the other actions. On the part of George Taylor it was then contended, that he did not represent his father; and by the appellant, that as the money which his father had recovered had been remitted to Lloyd, the agent in London of the creditors under the Restrictive Agreement, he was entitled to retain such part of the sum as corresponded to their interests. The cases having then come before Lord Cringletie, his Lordship pronounced this interlocutor:—'In the original action, considers that, as the Court has by a final interlocutor found that the respondents are liable to repay the dividend in question, with interest thereof, with the expenses of process, and remitted to the Lord Ordinary to proceed accordingly, the present Lord Ordinary has no discretion but to decern, in terms of that finding, after the sum due under it shall be arithmetically computed and ascertained, and the expenses modified; and consequently, that he has no power to ascertain any claim of deduction from the sums so found due. 2dly, The Lord Ordinary finds, that there are no termini habiles for trying the question, whether the respondents have or have not claims of deduction on account of the creditors of said Company who were parties to the Restrictive Agreement, as none of these individuals are parties to this suit; and therefore repels the claim of deduction made by the respondents, and decerns against the respondents for payment of the sum of L.2832. 16s. 3d. with interest thereon, at 4½ per cent, from the term of Whitsunday 1794 to the 8th day of June in the following year, and with interest at 5 per cent thereafter, during the not-payment, to Mr William Keith, accountant in Edinburgh, the judicial factor for said Company; reserving to the respondents to claim either against the creditors in the Restrictive Agreement, or in any other way that they shall be advised, for payment of the sums

‘ for which he has claimed deduction in this process: Finds June 4. 1894.  
 ‘ them liable for the expense of these proceedings, with the ex-  
 ‘ ception of the summons at the instance of the said William  
 ‘ Keith, and bringing the same into Court.’ On advising a repre-  
 ‘ sentation, his Lordship adhered; but of consent reserved consider-  
 ‘ ation of the liability of George Taylor in hoc statu; and to these  
 judgments the Court adhered on the 8th June 1891.\*

The appellant then brought an appeal, and contended,—

1. That although a man of honour may decline a fraudulent case, or may give it up if he find out the fraud during its progress, yet, without the instructions of his client, he has no right to proclaim to his adversary, or to the Judge, what never would have come to his own knowledge except in the confidence that it was not to be revealed; and therefore, even supposing the fact had been communicated in proper time to Mr Taylor, that Mackelcan was a gratuitous indorsee, and as such had received full payment, still, as the documents on which he founded afforded a title on which to claim as an onerous holder, Taylor could not be rendered liable for not divulging that which, as a confidential agent, he was bound to keep secret; and if so, then the circumstance of his afterwards recovering the money could not fix upon him any responsibility for the debt.

2. That as he had bona fide believed and represented that Mackelcan was an onerous purchaser, and as he was not aware that he was not so till after the decree had been signed, he was not entitled, without the authority of his clients, to make his adversary aware of the mistake; and that as he had not received any such authority, and had, in virtue of a regular power, recovered and remitted the money to Lloyd, who had undertaken to distribute it among the creditors to the Restrictive Agreement, no liability could attach to him.

To this it was answered,—That although an agent is not bound to reveal that which is confidentially communicated to him by his client, yet if he make himself particeps fraudis, a responsibility will attach to him; and therefore, as in this case Taylor, after he was in the full knowledge of the true fact, availed himself of the fraud to uplift the money, he was liable to account to those from whom he had so obtained it.†

\* See 1. Shaw and Ballantine, No. 67.

† In the appeal case for the respondents there is little or no argument upon this general point, but in their pleadings in the Court of Session it was thus stated:—  
 ‘ The representers believe they may safely admit this position, that an attorney is not



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The House of Lords 'ordered and adjudged, that the several interlocutors complained of be reversed, and that the defenders be assolied.'

LORD GIFFORD.—My Lords, This is a case in which the Messrs Taylors are appellants, and Mr Keith, who was factor over the sequestrated estate and funds belonging to the York Buildings Company, and several creditors of the Company, are respondents. I will endeavour shortly to state to your Lordships the circumstances under which this action arises.—My Lords, there was a person of the name of Mackelcan, who being possessed of various bonds of this Company,

'bound to reveal the secrets of his client, and consequently that an action will not lie against him for concealing facts tending to injure his client in the course of conducting his cause. So far the acknowledged land-marks of an attorney's province and duty protect him. But it is humbly conceived, that there he must pause. The privileges of a practitioner, or legal adviser, will not sanction even the most cautious approach to an act of connivance. The agent or counsel may conduct or argue his client's cause in safety, and in what manner he pleases, but he must not aid and abet the client in reaping and securing the profits of a claim unjustly earned, upon statements positively false, and upon a title radically bad. The representers will admit, though it is with pain they do it, that an attorney may, without incurring personal responsibility, carry on the cause of his client, though that cause should proceed from a fraudulent design. To that length he may go, but no farther. If he actually receives the money thereby fraudulently obtained, he becomes accessory to a positive wrong, and makes himself responsible to the innocent and defrauded party, whose property has been unjustly carried off. If so, it would appear that he may be pursued as a delinquent or wrong doer, inasmuch as his liability is founded upon tort, which is an established legal ground of responsibility.

'There is a plain and obvious principle which separates the path of the attorney from that of a delinquent. No agent is bound to betray the confidence reposed in him. But if the agent co-operate in carrying into effect any fraudulent plan, and receive the unlawful spoils, he makes himself a quasi principal, and participates in the delinquency of his employer.

'When it is maintained, therefore, that Mr Taylor made himself responsible for the money which he drew in Mackelcan's name, it is upon this plain ground, that his receiving that money, knowing it to be not due, was a tortious and unlawful act. Mr Taylor might have concealed the facts relative to Mackelcan's title, and conducted his cause to a successful issue, without incurring any personal responsibility, had he either refrained from participating in the receiving of that money, or if he did receive it, had he declared to the common agent how the fact stood, in order that the money might be restored to the general fund, (which restitution, your Lordships have by this time seen, it had been long before finally settled, neither the common agent, nor any other person, was entitled to ask). But Mr Taylor, by doing neither of these things, placed himself in the hazardous situation of a person knowingly taking payment of a debt which he knew had already been paid. In the eye of law that was a fraud; and the only mode by which the responsibility thence arising could be avoided, was by immediate restitution to the party from whom the money had been unjustly and erroneously recovered. Where that has not been done, it is submitted, that a *condictio indebiti* lies.'

claimed to be a creditor on these bonds. It turned out that his title was only to this extent—that he had made a loan falling very far short of the total amount claimed, and that in the proceedings which took place anterior to the Restrictive Agreement, Mr Mackelcan had been fully satisfied for the amount of his claim on the York Buildings Company. Notwithstanding that, however, Mr Mackelcan gave in the particulars of his debt. The debt was a large one,—but he agreed, under the Restrictive Agreement, to restrict his demand to, I believe, L. 750, in the first instance. There was then a reference to Mr Blair and another gentleman, who gave what is called in the law of Scotland a decret-arbitral, defining the persons who were to receive debts; and they, in ignorance of the real situation of Mackelcan, and conceiving him to be a creditor to the full extent of those bonds, directed that his debt should be paid to the very full extent, I believe, of L. 2400. That sum was ultimately drawn by Mr Taylor, and remitted by him to Mr Lloyd, for of that there is evidence,—not of general remittance,—but there is a distinct item in the account handed to him of the remittance of that very sum to Mr Lloyd. Mr Lloyd accounted to Mr Mackelcan for L. 750, retaining in his hands the remainder, which undoubtedly, according to the Restrictive Agreement, supposing Mr Mackelcan's claim to be a bona fide claim, was to be a sum ultimately for the general benefit of the restrictive creditors, supposing there was a balance over and above those sums to which they had restricted their claim.

It being discovered that Mr Mackelcan had no claim, several proceedings were instituted; and undoubtedly, my Lords, one is a little perplexed not only by the various proceedings, but by the various interlocutors which have been pronounced in this case. It appears, my Lords, that no less than three actions were brought; one by Mr Mackelcan, who sought to reduce the Restrictive Agreement, and said he was not bound by that, and that he was not only entitled to recover the L. 750, but, at the hands of Mr Lloyd and Mr Taylor, the whole sum they had received: that I understand to have been the nature of this action. Then there was a second action, which was an action of reduction at the instance of the common agent—that is, the person acting for the behoof of all the creditors—to have that decret-arbitral set aside; and concluding for repetition originally against Mr Mackelcan alone, of the sum he had received. Afterwards, that action was amended by making Taylor and Lloyd joint defenders with Mackelcan in that action. Then there was another action, which was an action concluding for reduction of the assignment.

My Lords,—The process of reduction was remitted to Lord Meadowbank, and his Lordship conjoined all the three processes on the 16th of January 1801. I think one of these actions commenced so far back as the year 1800. My Lords, Lord Meadowbank, on the 30th of May 1801, pronounced an interlocutor, by which he found, 'that the pursuers cannot be permitted to defeat the extracted decree; founded

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June 4. 1804. 'upon a decree-arbitral to which the partners were parties, upon the plea of *res noviter veniens*, or of the doers of the other parties not disclosing the secrets of their employers.' And after certain other findings his Lordship repelled the reasons of reduction, and assolizied the defender, which was Mackelcan. Now, your Lordships will perceive that the effect of that finding was, that the decree-arbitral could not be reduced, and therefore they could not recover from Mackelcan the sums of money he had received. It then states that Mr Lloyd offered to pay the money.

Then there was a note of the same Lord Ordinary, Lord Meadowbank, in October 1803, in these terms :—'The Lord Ordinary has considered this case again and again, wishing to save the parties further pleading before him, and to form a decisive opinion; but he has not been able to accomplish his purpose, either on the pleadings in process, or from the long apprenticeship he has served to the York Buildings Company cause. He inclines, however, to remain of the opinion formerly signified, as to the hazard and incompetency of shaking the decree-arbitral on any supposed error facti afterwards discovered on any plea competent and omitted.' Then he states, that he doubts also the title and interest of the Company to maintain the reductions; but there is no doubt of the interest of the creditors of April 1792 to maintain it, unless they are otherwise already paid in full; in which case, perhaps, the claims rejected by the arbiters in a question with the other creditors, may be brought forward to share this as a surplus, having been granted away to them by the Company under the agreement of April 1792, and something on the footing of the bond to Abany Wallis. It was necessary, therefore, to commit the concern to gentlemen who had made a particular study of the subject, who were to be paid first by the creditors in proportion to their interest; and whose discoveries of course belonged to the whole, and were to be fairly communicated.' With respect to Mr Taylor, as Mr Lloyd admits that he had the cash remitted to him, and Mr Lloyd seems ready and willing to obey any order with regard to it, the Ordinary sees no occasion for any memorial being put in on his part. Indeed, as there appears to have been no concealment by him from the arbiters, it does not occur that either the common agent or Mr Mackelcan can have any interest to object to his being assolizied.'

My Lords,—Various proceedings afterwards took place, and then there was an interlocutor on the 14th of January 1806, to which I will beg to call your Lordships' attention, which, proceeding on the finding that the Restrictive Agreement was not to be reduced, declared that Mr Lloyd was bound to apply the money to the purposes of the Restrictive Agreement :—' Finds, that the common agent has a title and interest to see that the money has been applied by Mr Lloyd, by their authority, or for their behoof; according to their respective interests; and that when he receives this satisfaction, he has no further interest to insist in this process: therefore ordains Thomas Lloyd to

\* put in a special condescendence how he has disposed of, or means to dispose of, the money in question, conformable to the rights of the creditors interested therein.' June 4. 1894.

My Lords,—There was afterwards an interlocutor of the 19th of November 1808, by which the Court of Session adhered to the interlocutor of the Lord Ordinary of the 14th of January 1808.

My Lords,—Some time after that period proceedings were resumed as against Mr Taylor; and, on the 14th of March 1810, the Lord Ordinary appointed the parties' procurators to give in memorials on the question with regard to the liability of Mr Taylor's representatives, against next calling. Then, on the 12th of November 1813, Lord Meadowbank pronounced the following interlocutor:—'Having considered the memorials for the parties, sustains the defences for John, William, and George Taylor, assolutes the defenders, and decerns;' and he then gave a very elaborate note, shewing the reasons of his judgment. These interlocutors were adhered to by an interlocutor of the 12th of February 1817; but, there being a reclaiming petition against that interlocutor, the Court of Session, on the 9th of June 1818, pronounced this interlocutor:—'The Lords having resumed consideration of this question, together with the relative short petition for the York Buildings Company, and having advised the same, with the answers thereto, minute for the petitioners, and answers to that minute; they alter the interlocutors reclaimed against, and find that the respondents are liable in repayment of the dividend in question, with interest thereof, together with the expenses of process, and remit to Lord Roston to proceed accordingly;' and this interlocutor has been subsequently adhered to. The result, therefore, of this interlocutor is this, that the Court of Session have found that Mr Taylor is liable to repay to the common agent, for the general body of creditors, the whole sum drawn by him in respect of Mackelcan's debt.

Now, my Lords, there is this singularity in the present state of the proceedings:—First of all, the decret-arbitral is not reduced—the decret-arbitral therefore stands, by which it is found that Mackelcan is entitled to a sum of between L.2000 and L.3000: It has been found that Mackelcan is not liable to repay the L.750 he received, because that decret-arbitral stands: Mr Taylor remitted the whole money to Mr Lloyd: Mr Lloyd is out of the field at present, but the Court of Session have decreed, that though the decret-arbitral is not reduced, and no remedy can be had against Mackelcan for the L.750,—that from the supposed concealment of Taylor of the real circumstances of the case—from the concealment made, as it should seem, just at the very time when they were about to sign, or had actually, according to Taylor's representation, signed the decret-arbitral, his representatives are called upon to repay the whole of this dividend of two thousand and odd pounds received by him, though he had remitted to Mr Lloyd the L.750, and that had been paid to Mr Mackelcan, and

June 4. 1824. though the decret-arbitral remains unreduced by which it was found that L.750 was due to Mr Mackelcan. My Lords, I must confess, that after all the attention I have been able to give, going most carefully through the interlocutors in this case,—though I agree with the Lords of Session in the other cases, I cannot agree with them in this. I do not think that Mr Taylor, under the circumstances of this case, is subject to be called upon to repay this two thousand and odd pounds. If that decret-arbitral could be reduced, it ought to be reduced: when it was reduced, it would become a question, whether that sum could be recovered from Mr Taylor, he having remitted it to a person who has been found competent to receive it.—Mr Lloyd. If Mr Lloyd has the money, which undoubtedly he has, except the L.750, the party from whom it ought to be recovered is Mr Mackelcan, the principal party to the fraud, who received the money with the full knowledge that he had been satisfied; and yet here the Court of Session have fixed on one of the agents the whole sum he had drawn from the Court in Scotland under the decret-arbitral, though he had accounted for it to Mr Lloyd; and though Mr Lloyd had accounted for a portion of it to Mr Mackelcan; and though, as I have already stated, the decret-arbitral remained unreduced, by which it was found that Mackelcan was entitled to this sum; and though the Lord Ordinary, so long ago as the year 1806, or before that, had determined that that decret-arbitral could not be reduced. There has been no attempt to disturb that decision. I must confess I cannot concur in the opinion the Court of Session have expressed; and therefore, upon this case, it will be my humble duty to propose to your Lordships that this latter interlocutor should be reversed. But in the multiplicity of these interlocutors, though I endeavoured last night accurately to go through them, in order to see what judgment your Lordships should pronounce,—in matter of fact I must request your Lordships' indulgence till we next sit, to propose to your Lordships the proper form of your judgment. I expect the result will be, that the last interlocutors, subsequent to the interlocutor of the 12th of February 1817, shall be reversed, and that thereby the preceding interlocutors which that interlocutor reversed will be affirmed; the result of which will be to assoilzie Mr Taylor, in this action, from the demand made against him by the pursuers, (the respondents here)—altogether from any demand. I now move your Lordships, that the further consideration of the case be postponed till I have the honour of attending your Lordships again.

BERRY—J. CAMPBELL,—Solicitors.

(Ap. Ca. No. 51.)

JAMES SMITH, and Others, Appellants.—*Shadwell—Abercromby.* No. 38.  
BANK of SCOTLAND, Respondents.—*Murray—Walker.*

*Writ—Testing Clause—Statute 1681, c. 5. and 1696, c. 15.—Circumstances under which (affirming the judgment of the Court of Session) objections to a bond of caution, that it had not been signed at the time or place, nor before the witnesses mentioned in the testing clause, were repelled.*

IN 1794 Alexander Paterson was appointed agent of the Bank of Scotland at Thurso, and found caution for L. 5000. Early in 1804 he was required by the Bank to find additional caution for L. 5000, which he accordingly agreed to do. The cautioners who consented to become bound were the appellants, James Smith, George Swanston, Harry Bain, John Sinclair Gunn, and the Reverend Patrick Nicolson, (who was now dead, but was represented by his son, Alexander Nicolson). A formal bond of caution, written on one sheet, and consisting of four pages, was then prepared by the secretary of the Bank, and transmitted to Paterson, in order to be signed by him and the cautioners, which was accordingly done by their subscribing the last page. The testing clause was then filled up; and from it the bond appeared to have been signed by Swanston and Gunn at Thurso upon the 22d of June, and by the other cautioners on the 23d. The signature of Bain was stated to have been attested by two persons of the name of M'Phaul and Quoys, and those of the other cautioners by Phineas Ryrie and Stewart Ryrie. The bond was thereupon sent by Paterson to the secretary of the Bank at Edinburgh, who, observing that it was subscribed only on the last page, immediately returned it to Paterson, with instructions that it should be signed upon each page. This was accordingly done on or about the 11th July; but no notice was taken of it in the testing clause.

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2d DIVISION.  
Lord Pitmilley.

In consequence of this bond, Paterson was allowed to act as agent for a few weeks thereafter, when it having been discovered that his affairs were in great disorder, and it being alleged that he had been guilty of malversation, he was removed on the 17th of August, and the books and cash were, in presence of the cautioners, delivered over to one of the officers of the Bank. On making inquiries, the appellants conceived that the Bank had been aware that, for some time previously, Paterson had incurred large arrears, and that the object of obtaining the new bond was to secure payment of them. They therefore resolved to resist implementation of their bond; and with that view brought a suspension and

June 4. 1824. reduction of it, on the ground that, previous to Paterson's removal, it had not been duly delivered; that it had not been duly executed according to the Acts 1681, c. 5. and 1696, c. 15.; and that, at all events, it had been obtained from them by means of fraud.

The Court having, on the 15th May 1806, repelled the reasons of suspension and reduction, the appellants entered an appeal to the House of Lords; and on the 16th June 1823, their Lordships pronounced this judgment:—‘The Lords Spiritual and Temporal in Parliament assembled, find, That the deed in question, if not impeachable upon other grounds, is to be considered as a delivered deed; and find, that the appellants in this case ought to be allowed to make proofs of the circumstances, by them alleged as ground for reducing the deed in question as unduly obtained by concealment or deception, if the deed is valid, according to the statutes of 1681 and 1696: And it is therefore ordained and adjudged, that the cause be remitted back to the Court of Session in Scotland, to reconsider the same as to the validity of the deed, as the same may be affected by the said statutes, or either of them, having regard to the nature of the deed; and that the Court do proceed in reconsidering the same as to them shall seem meet, and according to their practice: And it is farther ordered, that in case the said Court shall, upon such reconsideration, adjudge that the said deed is valid, if duly obtained, that the petitioners be allowed a proof of the circumstances by them alleged as affording grounds for reducing it as unduly obtained as aforesaid: And it is farther ordered and adjudged, that, with these findings and directions, the said Court do review the several interlocutors complained of in the said appeal, and proceed upon such review as to the Court shall seem meet and just.’

The case having then returned to the Court of Session, and having been remitted to Lord Pitmilley, his Lordship appointed the appellants to give in a condescendence of what they averred in relation to the execution of the bond. Accordingly a condescendence, in these terms, was lodged:—‘*1mo*, The bond in question was not subscribed upon the first, second, and third pages; till after it was sent the second time from Edinburgh, which was long after the dates mentioned in the testing clause.

‘*2do*, Even the last page of the bond was not signed upon either the 22d or the 23d days of June, as stated in the testing clause, nor at the places which are there specified. George Swanston and John Sinclair Gunn, who are said to have subscribed at Thurso upon the 22d of June, did not subscribe till

the 24th of June, which was a Sunday, and then they were not at Thurso, neither was there any more than one witness present on the Sunday when they did subscribe. June 4. 1894.

3<sup>th</sup>. The subscription of Patrick Nicolson, who died several years ago, if it be genuine, was adhibited without any witnesses being present, either at the subscription of the last or the preceding pages.

4<sup>th</sup>. The additional subscriptions of Mr Swanston and Mr Gunn were not adhibited before the witnesses mentioned in the testing clause, or any other witnesses at all.

5<sup>th</sup>. Francis Quoys, who is said to be a witness to Mr Bain's subscription, was at London, or at least out of Scotland, before Mr Bain's additional subscription took place; and there was only one witness present when Mr Smith subscribed the first, second, and third pages.

6<sup>th</sup>. That Phineas Ryrie, one of the alleged witnesses to the whole subscriptions, except Harry Bain's, neither saw the obligants subscribe, nor heard them acknowledge their subscriptions: That Stewart Ryrie, the other alleged witness, in Paterson's office folded down a paper, and asked him to put down his name as a witness, which he did without knowing or being told what the paper was.

On advising this condescendence, with memorials, his Lordship allowed the appellants 'a proof of the 6th article of their condescendence, and all facts and circumstances relative thereto, and to the defenders a conjunct probation thereanent; but found the other articles of the condescendence irrelevant, and refused to allow a proof thereof.' At the same time his Lordship issued the following note of his opinion:—'It seems proper to explain in a note the grounds of the above interlocutor. 1<sup>st</sup>, Though asserted by the pursuers, and admitted by the defenders, as well as proved by written evidence, that the first, second, and third pages of the bond were not signed till after it was returned from Edinburgh for that purpose, and after the dates mentioned in the testing clause, this appears unimportant; because it would not have been a relevant objection to the bond that the first three pages were not subscribed at all; it being found, that the Act 1696 does not extend to writs consisting of one sheet only. Many authorities for this are quoted in the memorial, in addition to which a very express authority will be seen, Elchies' Report of Robertson v. Kerr, and also in his notes in that case, voce *Writ*. 2<sup>d</sup>, The averment, that some of the subscriptions to the bond were not adhibited at the



June 4. 1824. ' time or at the places mentioned in the testing clause, appears  
' also to the Lord Ordinary to be not relevant in the present  
' inquiry; because the Acts 1681 and 1696 contain no provision  
' with regard to the time and place of subscribing deeds. These  
' two remarks embrace the first five articles of the condescen-  
' dence. 3d, With regard to the sixth article, the Act 1681  
' requires, that the witness shall see the party subscribe, or hear  
' him acknowledge his subscription. That the party afterwards  
' admits to the Court that he signed the deed, will not be suffi-  
' cient to overcome the want of the solemnity of signing before  
' witnesses, or acknowledging the subscription to subscribing  
' witnesses required by the statute; and this is proved even by  
' the reasoning in the case quoted for the Bank, of *Richardson v.*  
' *Newton*, 28th February 1811. The Lord Ordinary, therefore,  
' must allow a proof of the pointed averment in the sixth article;  
' but the proof is before answer, and reserving every objection  
' to the credibility of the instrumentary witness, if it is intended  
' to establish by his parole testimony a fact which is contra-  
' dicted by his subscription to the deed adhibited under the  
' statutory penalties.'

Both parties having represented, his Lordship issued a note, in which he stated, that he remained ' of his former opinion as  
' to the relevancy of the sixth article of the condescendence, and  
' the irrelevancy of the others. With regard to the sixth article,  
' he has looked through the former papers, and does not observe  
' that the averments in the six articles were pointedly made be-  
' fore the case went to the House of Lords, so that the Court  
' had no opportunity of judging of their relevancy. The sum-  
' mary of the decision of *Richardson v. Newton*, in the Faculty  
' Collection, seems inaccurately expressed.

' The Lord Ordinary desires the cause to be enrolled, that  
' before he disposes of the representation and answers, the parties  
' may explain the following particulars:—1st, The pursuers'  
' averment as to Patrick Nicolson's subscription is materially  
' varied from what it was in the condescendence. It is there  
' said, that Nicolson's subscription " was adhibited without  
' " any witnesses being present." It is now said in the pur-  
' suers' representation, p. 8. " that the subscribing witnesses  
' " did neither see Nicolson subscribe, or hear him acknowledge  
' " his subscription." If the pursuers maintain this new averment,  
' or assert any thing as to Nicolson's subscription which does  
' not fall under the six articles of the condescendence, they must  
' state their averment briefly in an additional condescendence,

‘with which they may come prepared to the Bar. 2dly, As to June 4. 1894.  
 ‘the defenders’ plea of rei interventus, the facts are not suffi-  
 ‘ciently explained, and the parties are so greatly at variance  
 ‘about them, that the Lord Ordinary cannot at present decide  
 ‘upon it. The proof as to the execution of the deed being be-  
 ‘fore answer, this defence of rei interventus will be kept entire;  
 ‘but farther explanations of the facts may be made at the Bar,  
 ‘so as to enable the Ordinary to determine whether this point  
 ‘should be decided at present, or how it should be disposed of.’

Parties having then been heard, his Lordship appointed the appellants to lodge an additional condescendence in regard to the subscription of Nicolson, and the respondents to condescend as to their plea of rei interventus. Accordingly, the appellants, in their additional condescendence, averred, ‘that  
 ‘neither Stewart Ryrie nor Phineas Ryrie, who are stated to  
 ‘have been the instrumentary witnesses, were either present at  
 ‘the subscription of Mr Patrick Nicolson, deceased, nor did Mr  
 ‘Nicolson acknowledge his subscription to them, or desire them,  
 ‘or either of them, to subscribe as witnesses thereto.’

The Lord Ordinary then pronounced this interlocutor :—  
 ‘Having particularly attended to the terms of the remit from  
 ‘the House of Lords, by which this Court is appointed, in the  
 ‘first place, to consider the validity of the deed in question, as  
 ‘the same may be affected by the statutes 1681 and 1696, finds,  
 ‘That it is proper and necessary, in carrying this remit into  
 ‘effect, to investigate, by means of a proof, every averment made  
 ‘by either party which may appear relevant in considering the  
 ‘validity of the deed, as the same may be affected by the statutes  
 ‘referred to: Finds, therefore, that as the sixth article of the  
 ‘pursuers’ condescendence still appears to the Lord Ordinary to  
 ‘contain a relevant and important allegation on the subject; and  
 ‘as the additional condescendence for the pursuers also appears  
 ‘to be relevant, a proof ought to be allowed before answer of  
 ‘the sixth article of the original condescendence, and likewise of  
 ‘the additional condescendence; and that when the import of  
 ‘the proof comes to be considered, it will then be proper, at the  
 ‘same time, to determine with regard to the defenders’ plea of  
 ‘rei interventus, as to which a parole proof is not desired; and  
 ‘also as to the defenders’ plea, that the pursuers are barred per-  
 ‘sonali exceptione from objecting to the validity of the deed,  
 ‘and that the deed is to be considered as of the nature of privi-  
 ‘leged deeds: On these grounds, and reserving the defences now  
 ‘alluded to, to be disposed of when the proof comes to be con-

June 4. 1894. 'sidered, refuses the desire of both representations, and adheres to the interlocutor represented against; and of now allows the pursuers a proof of the sixth article of their original condensation, and also a proof of their additional condensation; and of all facts and circumstances relative thereto; and allows the defenders a conjunct probation thereanent.'

The appellants having reclaimed to the Court, in regard to the rejection of the five first articles of the condensation, their Lordships, on the 22d of February 1818, adhered. Having again reclaimed, the Court, 'before answer, allowed a proof to the appellants of what they can adduce with regard to the execution of the deed in question,' and also as to the plea of rei interventus; but as no decision was pronounced on this latter point, it is unnecessary to take any farther notice of it. A proof was then taken by an examination of the instrumentary witnesses. Those who had attested the subscription of Bain were Quoys and M'Phaul, the latter of whom was now dead, and the deposition of Quoys was emitted after the lapse of fourteen years from the execution of the deed. The material part of that person's testimony is subjoined in a foot-note.\*

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\* Interrogated, Whether the words " Francis Quoys, witness," appearing at the said bond, is the proper handwriting of the deponent? depones affirmative, to the best of his knowledge. Interrogated, Can the witness mention the day, and at whose request he subscribed as witness to the said bond? depones, That he cannot condescend upon the day that the said bond was signed by him as witness thereto, but that his subscription was adhibited thereto at the desire of Mr. Paterson. Interrogated, Can the witness from recollection say whether it was in June or July that he so subscribed witness to the said bond? depones negativé. Interrogated, Where did witness subscribe the said bond? depones, That it was subscribed by him in the shop of William Bain and Company of Wick, of which he was then a partner. Interrogated, Was there any one present on that occasion? depones, That there were several people then in the shop, whose names the deponent cannot condescend upon. Interrogated, Was Mr. James Macphaul present on that occasion? depones affirmative. Interrogated, Did Mr. Macphaul subscribe the bond also as a witness at the same time with the deponent? depones affirmative. Interrogated, At whose request did Mr. Macphaul so subscribe? depones, That he cannot say for certain whether the said Mr. Macphaul was asked particularly, and individually, by Mr. Paterson to subscribe the said bond as a witness; but the deponent did understand that the said Mr. Paterson, when he came within the counter, with the said bond in his hand, asked the witness to subscribe the same: That this application was addressed to the said Mr. Macphaul as well as to the deponent. Interrogated, Did Mr. Paterson at that time mention to the deponent and Mr. Macphaul what the paper was which he asked them to subscribe? depones negativé. Interrogated, Was Mr. Harry Bain, whose subscription the deponent is said to have witnessed, present on that occasion? depones, That he does not recollect whether Mr. Bain was then present, among the many persons who were then in the shop; but the deponent did not remark him as having been there present. Interrogated, Did the deponent, previous to his signing the bond as above, see the said Mr. Harry Bain adhibit

The signatures of the other cautioners were attested by Phineas Ryrie and Stewart Ryrie, the former of whom was examined under an incidental warrant two years after the execution of the deed, and the latter at the same time with Quoy. The material parts of their depositions will be found in a foot-note.\*

June 4. 1824.

his subscription to it? depones négatif. Interrogated, Did Mr Bain, at any time previous to the deponent subscribing as a witness, acknowledge to him that he had subscribed the said bond? depones négatif. Interrogated, Did the deponent see the said bond or paper which he so subscribed as a witness on any other occasion, either before or since, till it was now shewn to him? depones négatif. Interrogated, Is Mr James Macphail still alive? depones négatif.

\* Stewart Ryrie being interrogated, 'Whether Phineas Ryrie, whose name the deponent now sees at the bond as an instrumentary witness, saw the obligants subscribe, or heard them acknowledge their subscription? depones, That Phineas Ryrie subscribed the bond before the deponent exhibited his subscription; and he is certain that, when Phineas Ryrie so subscribed it, no person was present except the deponent. Depones, That the bond always remained in the deponent's custody, except on two occasions, when it was taken by Mr Paterson in order to be subscribed by Patrick Nicolson and Harry Bain on the fourth page. And depones, That after the bond had been subscribed by all the parties except Harry Bain, the deponent one evening called Phineas Ryrie into the Bank-office in Thurso, and there Phineas Ryrie exhibited his subscription in the presence of the deponent, no other person being present. Depones, That the deponent asked Mr Paterson who he should wish to be the other instrumentary witness besides the deponent; and Mr Paterson having suggested Phineas Ryrie, the deponent called in the latter, and the bond was subscribed by him, as above-mentioned. Depones, That Phineas Ryrie subscribed the bond at the deponent's request: That he does not recollect particularly what conversation passed; but he has no doubt that Phineas Ryrie was aware that the writing subscribed by him was a bond. Depones, That the deponent was present when Alexander Paterson, James Smith, George Swanson, and John Sinclair Gunn, subscribed the said bond. And depones, That when these four parties so exhibited their subscriptions, Phineas Ryrie was not present.'

Phineas Ryrie being interrogated, deponed, 'That he paid very little attention to the subscriptions, and cannot say that it was from any knowledge of their being genuine that he put down his name as a witness, having been chiefly influenced thereto by his situation as a servant in the office, and a belief that they were the true subscriptions of the parties. Interrogated, In what place did he subscribe the said bond? depones, That he subscribed it in the Banking-office at Thurso. Interrogated, Was Stewart Ryrie, Mr Paterson's clerk, or any other person, present with him when he signed the bond? depones, That the said Stewart Ryrie was then present, and no other person, so far as the deponent recollects. Interrogated, At whose desire did he subscribe his name to the said bond? depones, That it was at the desire of the said Stewart Ryrie that he did so. Interrogated, Does he recollect who were the parties obligants in the said bond? depones, That he does not recollect. Interrogated, When he signed his name to the said bond, did he observe any names of the granters of it, and did he know these granters? depones affirmative. Interrogated, Does he recollect to have seen any of the said persons sign the bond, or did they, or either of them, acknowledge their subscriptions to him? depones négatif to both parts of the interrogatory.'

June 4. 1834.

On advising memorials and the proof,—

*Lord Glenlee* observed, that where witnesses subscribe, without having seen the granter sign, or heard him acknowledge his signature, the statute did not render the deed null, but only subjected the witnesses to punishment. The deed might, no doubt, be liable to be challenged on the head of forgery, but if there be no such challenge, and it bears *ex facie* the statutory solemnities, it is a good deed. In the present case, however, it was unnecessary to decide this general point, because, as this was a cautionary obligation, and the signatures were admitted to be genuine, it did not require the solemnities of the statute.

*Lord Craigie* agreed with *Lord Glenlee*. There are cases where writing is essential as a solemnity, and others where it is not; among the latter of which is that of a cautionary obligation. If a party admit, or do not deny, an avowment that he became a cautioner, that is sufficient to bind him; and therefore the obligation in question is effectual, without regard to the Act 1681. But even supposing it were a deed falling under the statute, I concur with *Lord Glenlee*. The statute prescribes a certain form of writing; but it does not declare, that if the witnesses do not see or hear the granter sign or acknowledge his signature, that it shall be null. All that it enacts is, that the transgressing witnesses shall be punished. I consider that parole evidence is inadmissible to contradict what appears on the face of the deed; but even if it were so, I am clear that the testimony of the instrumentary witnesses is not sufficient *per se*.

*Lord Bannatyne* coincided with *Lord Craigie*, as to the distinction between different kinds of deeds, and as to there being no necessity for the bond being tested, in terms of the statute. He had also great doubts as to the admissibility of the instrumentary witnesses, except to prove the signature of the granter in the event of its being disputed; but he thought it quite incompetent to examine them in order to contradict their own signatures.

The *Lord Justice-Clerk* was of opinion, that a proof that the witnesses neither saw the parties sign nor acknowledge their signature, was competent and relevant; but he thought it was not sufficient where it consisted merely of the evidence of the instrumentary witnesses. If the fact were proved by satisfactory evidence, he was of opinion that the deed would be null. The statute lays down a code of regulations for the authentication of deeds, and if any one of them were violated, then the deed would be null. The two clauses in the statute are not unconnected.

The first enacts, that no one shall subscribe but such as have seen the granter sign, &c. A witness, therefore, who has not complied with this enactment, is not a witness in terms of the statute. His Lordship however stated, that as the signatures were here admitted, and as the proof was quite unsatisfactory, he could not hold that the allegations of the cautioners were established. June 4. 1821.

*Lord Robertson* was of opinion, that as the subscriptions had not been made in terms of the statute, they were equal to no subscription at all, and therefore that the deed was null.

The Court, therefore, on the 25th January 1821, 'repelled the reasons of reduction, in so far as founded on the statute 1681; found the defenders entitled to the expenses incurred by them in discussing that part of the cause which related to that statute;' and found it unnecessary to investigate farther, or to decide the plea founded on a *rei interventus*; but allowed the appellants to give in a condescendence of what they averred in relation to the bond having been obtained by fraud and deception.\*

Against these judgments the appellants entered an appeal, in support of which they maintained,—

1. That as the bond, at the date of its execution, had only been subscribed on the last page, it was not effectual; that there was no foundation for the plea, that as it consisted of only one sheet, the subscription on each page was not requisite; and that as the signatures on the other pages had been adhibited at a subsequent period, the objection could not thereby be removed.

2. That the interlocutors were erroneous, in so far as it was held irrelevant to allege that the bond had not been executed at the time and place there mentioned; for although the statute 1681 did not specially require that either of these circumstances should be mentioned, yet they were material and relevant to the inquiry as to whether the witnesses had seen the subscription, or heard it acknowledged.

3. That the bond was a deed falling under the statute, and it was an erroneous construction of them to maintain, that if the requisites of the statute were not complied with, the witnesses were only liable to punishment, and that the deed was nevertheless effectual. And,

4. That as it had been repeatedly decided that the instrumentary witnesses were admissible, and as their testimony com-

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\* Not reported.

June 4. 1824. **pletely established the allegations, the deed ought to have been reduced.**

On the other hand it was maintained by the Bank, that the interlocutors were well founded,—

1. Because the averment, contained in the 1st and 2d articles of the appellants' condescendence,—that some of the subscriptions to the bond were not adhibited at the times or at the places mentioned in the testing clause,—is utterly irrelevant in the present question. It is not essential to the validity of a deed that it should set forth the time and place of subscribing; the Acts 1681 and 1696 contain no provision whatever with regard to the date of deeds; and the appellants have not alleged that a false date was inserted from any fraudulent motive.

2. Because the averment contained in the 4th and 5th articles of the said condescendence, with regard to the subscriptions on the three first pages of the bond, are also utterly irrelevant. In a deed consisting only of one sheet, the subscription of the last page is sufficient to render it valid; and, therefore, there would have been no room for any objection under the Act 1696, c. 15. even if the three first pages had not been subscribed at all.

3. Because the averments contained in the 3d and 6th articles of the said condescendence, and in the additional condescendence, would not, if proved, constitute a nullity under the Act 1681, c. 5.; and are utterly irrelevant in the present case, where the deed is *ex facie* perfect in every legal solemnity, and where the granters do expressly acknowledge that their subscriptions are genuine. When an obligation, *ex facie* regularly executed and attested, is delivered to the obligee, the obligor stands pledged for its validity, and cannot be heard in a Court of Justice to plead that it labours under a latent defect, attributable to his own fraud, ignorance, or negligence.

4. Because the testimony of the instrumentary witnesses, even supposing that it might be competently resorted to, is not corroborated by any other evidence; and in itself by no means warrants the conclusion, that the witnesses did not, in point of fact, either see the parties subscribe, or hear them acknowledge their subscriptions.

5. Because, even if the writing were altogether informal, the cautionary obligation would be good against the appellants, who admit their subscriptions, and do not deny that the obligation set forth in the deed is precisely the obligation which they undertook.

6. Because the deed in question is a privileged deed, the par-

ties to it being many, and they being presumed to have been witnesses to the subscriptions of each other. June 4. 1824.

The House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed, with £200 costs; and it is further ordered, that the cause be remitted back to the Court of Session, to proceed therein as may be just and necessary.'

**LORD GIFFORD.**—My Lords, There is a case, which undoubtedly is one of very considerable importance—the case of Smith and others v. The Bank of Scotland. My Lords, this is the second time this case has been before your Lordships; and therefore I will take the liberty, as briefly as I can, of stating to your Lordships the circumstances of this case.

My Lords,—It appears that, in the year 1794, Alexander Paterson was appointed agent of the branch of the Bank of Scotland at Thurso, and that he then found security, as it is called in Scotland, to secure the Bank for his transactions in that character, to the extent of £5000. It appears, that in the year 1804, having continued their agent up to that period, some of the sureties having in the mean time died, he was called upon to give additional security, to increase the security from £5000 to £10,000. He felt a little difficulty about it, and he wrote to the Bank, stating, that as his bond was most unexceptionable, he hoped the directors would not desire any thing more than to find the additional security, and that he would give a new security to the extent of £5000 more as soon as circumstances would permit; and, accordingly, he proposed as his sureties for this additional sum of £5000, the following gentlemen—Mr James Smith, Patrick Nicolson, George Swanson, Harry Bain, and John Sinclair Gunn. My Lords, accordingly the bond was returned, as it was supposed, regularly executed by those gentlemen; but there being found a supposed informality in the execution of it, namely, that they had only signed their names to the last page of the sheet upon which the security was written, and it being supposed in some quarter, that by the law of Scotland it was necessary that, though written on one sheet, the signatures should be affixed to each page; the bond was returned for that purpose, and this gentleman continued as the agent of the Bank at Thurso, from that period until the year 1806.

My Lords,—Mr Paterson falling into difficulties, and the sureties apprehending that a demand would be made upon them for this £5000, they presented a bill of suspension, on the ground that their obligation extended only to the transactions of Paterson subsequent to its date, and that on those transactions he was not indebted to the Bank to the extent of £5000. And they also brought an action of reduction, that is, an action to get rid of the security,—to reduce it, as it is termed by the law of Scotland, on the ground that the bond should



June 4. 1834. be set aside in toto, as not having been regularly executed according to the statutes of 1681, cap. 5., and 1696, cap. 15.; as also, upon the ground that it had not been duly delivered prior to Paterson's removal from the agency; and another ground on which they sought to have it reduced was, that it had been improperly or fraudulently obtained.

My Lords,—In this action, on its coming before the Court on the 15th of May 1806, they pronounced an interlocutor, repelling the reasons of reduction, and assolzieing the defenders, and they found the pursuers liable in the full expense of extract, but in no farther expenses, and decerned: the result of that decision was completely in favour of the Bank of Scotland, that it was a valid and subsisting security. Against that there was a reclaiming petition; and the Court having still adhered to their former decision, the case was brought by appeal before your Lordships' House in the month of June 1813: and it appears by extracts which have been published in an appendix to some of these proceedings, containing the opinions at that time delivered by the Lord Chancellor, and another noble and learned Lord who assisted him upon that occasion, that they thought, upon the question of the delivery of the deed, it had been well delivered; but they thought there were other points in the case which had not been sufficiently considered by the Court below; and therefore they remitted the case back to the Court, their Lordships pronouncing the following judgment:—‘ That the deed in question, if not impeachable on other grounds, is to be considered as a delivered deed; therefore they put an end to that question, and find, that the appellants in this case ought to be allowed to make proof of the circumstances by them alleged as grounds for reducing the deed in question, as unduly obtained by concealment or deception, if the deed is valid according to the statutes 1681 and 1696; and it is therefore ordered and adjudged, that the cause be remitted back to the Court of Session in Scotland, to consider the same as to the validity of the deed, as the same may be affected by the said statutes or either of them, having regard to the nature of the deed; and that the Court do proceed in reconsidering the same, as to them shall seem meet and according to their practice: And it is further ordered, that in case the said Court shall, upon such reconsideration, adjudge that the said deed is valid if duly obtained, that the petitioners be allowed a proof of the circumstances by them alleged, as affording ground for reducing it as unduly obtained as aforesaid: And it is further ordered and adjudged, that with these findings and directions, the Court do review the several interlocutors complained of in the said appeal, and proceed upon such review as to the Court shall seem meet and just.’

Your Lordships perceive, that by this remit the Court below were first to consider, whether this deed was properly executed within the meaning of these statutes: if they were of opinion it was properly executed, it was then ordered, that a proof of the circumstances should be allowed to the appellants in this case, to reduce the deed if they could,

on the ground that it had been unduly obtained, which was a perfectly different question, and could not arise if the deed was an invalid deed in other respects. June 4. 1824.

*My Lords*,—On this case going back, the appellants presented a petition to the Court, in the month of July 1813, which petition was remitted back to my Lord Pitmilley, who after hearing Counsel at considerable length on the subject of the remit, pronounced the following interlocutor :—‘ Appoints parties to give in memorials upon the point as to the validity of the deed, as the same may be affected by the statutes 1681 and 1696; and appoints the pursuer to give in the memorial on his part, accompanied with a condescendence, in terms of the Act of Sederunt, of the facts he avers and offers to prove in support of his averment.’

In obedience to this interlocutor, the appellants, who are the sureties for this gentleman, gave in a condescendence, setting forth that some of the subscriptions to the deed were not adhibited at the time and place mentioned in the testing clause; that no witnesses were present at the subscriptions on the three first pages; and in the sixth article they offered to prove, that Phineas Ryrie, one of the alleged witnesses to the whole subscriptions, except Harry Bain, neither saw the obligants subscribe, nor heard them acknowledge their subscriptions; that Stewart Ryrie, the other alleged witness, in Paterson's office folded down a paper, and asked him to put down his name as a witness, which he did without knowing or being told what the paper was. In the answers to this condescendence the respondents admitted, that the deed was originally subscribed only on the fourth and last page, and was afterwards returned to Paterson, with instructions that it should be subscribed by the co-obligants on all the pages, in presence of their respective witnesses. With regard to the other articles of the condescendence, the respondents denied that they were either true or relevant.

*My Lords*,—On this, mutual memorials were lodged, and on the 12th of May 1814 the Lord Ordinary pronounced the following judgment, which is the first interlocutor appealed from, now, to your Lordships. (His Lordship then read the interlocutor and the note of the Lord Ordinary. See ante, p. 267.)

*My Lords*,—Against this interlocutor mutual representations were given in, upon which the Lord Ordinary gave out the following note on the 15th of November. (His Lordship then read the note and relative order. See p. 268.)

*My Lords*,—The cause was accordingly called, and the Counsel for the respondents was heard upon their plea of rei interventus; but as the Counsel for the appellants was called to the Inner-House, the Lord Ordinary pronounced the following interlocutor on the 1st of March 1815 :—‘ Appoints the procurator for the pursuers to give in an additional condescendence of what he asserts in page 8. of his representation, as to the subscribing witnesses neither having seen Nicol-

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'son subscribe, nor heard him acknowledge his subscription; and farther, appoints the procurator for the defenders to put in a condescendence on his part, of what he has stated this day at the Bar in support of his plea of rei interventus; both condescendences to be lodged on or before Tuesday next, with certification.'

My Lords,—In consequence of this, a condescendence was put in by the respondents, and an additional condescendence on the part of the appellants; and on the 19th of May the Lord Ordinary pronounced an interlocutor, also appealed from, which is to this effect:—' Finds, that it is proper and necessary, in carrying this remit into effect; to investigate by means of a proof of every averment made by either party, which may appear relevant in considering the validity of the deed, as the same may be affected by the statutes referred to: Finds, therefore, that as the sixth article in the pursuers' condescendence still appears to the Lord Ordinary to contain a relevant and important allegation on the subject, and as the additional condescendence for the pursuers also appears to be relevant, a proof ought to be allowed before answer of the sixth article of the original condescendence, and likewise of the additional condescendence; and that, when the import of the proof comes to be considered, it will then be proper at the same time to determine with regard to the defenders' plea of rei interventus, as to which a parole proof is not desired, and also as to the defenders' plea, that the pursuers are barred personally exceptions from objecting to the validity of the deed, and that the deed is to be considered as of the nature of a privileged deed: On these grounds, and reserving the defences now alluded to to be disposed of when the proof comes to be considered, refuses the desire of both representations, and adheres to the interlocutor represented against; and of new allows the pursuers a proof of the sixth article of their original condescendence, and also a proof of their additional condescendence, and of all facts and circumstances relative thereto; and allows the defenders a conjunct probation thereanent.'

My Lords,—An application was then made to the Lord Ordinary to allow the oath of Stewart Ryrie, one of the instrumentary witnesses, who it was alleged was about to go abroad, to be taken to lie in retentis; and on the 19th of May an interlocutor was pronounced by the Lord Ordinary, by which he allowed the pursuers to prove by the oath of Mr Ryrie the whole facts and circumstances averred by them, and all other facts and circumstances relative thereto; and allowed the defenders a conjunct probation thereanent, and granted diligence against Mr Ryrie to the effect foresaid. My Lords, there was a representation with respect to the examination of Stewart Ryrie to lie in retentis, and after hearing Counsel upon that point, the Lord Ordinary pronounced as follows:—' The Lord Ordinary having heard parties' procurators, finds, that the said Stewart Ryrie's examination and evidence can only proceed and be taken as to the facts and circumstances allowed to be proved by the former interlocutors, and interlocutor of the

'Lord Ordinary of yesterday's date upon advising representations and answers for the parties, and with this explanation allows the examination of Stewart Ryrie to proceed.' June 4. 1824.

My Lords,—The appellants then gave in a representation against this interlocutor of the 20th of May 1815, praying his Lordship to authorize the commissioner to examine Ryrie, not only on the points admitted already to probation, but also on all circumstances relative to the rei interventus. Upon advising this representation, the Lord Ordinary pronounced an interlocutor of the 23d of May, which is also appealed from, by which he found, 'that the interlocutor of the 19th current, with regard to the examination of Mr Stewart Ryrie, in so far as it allowed the pursuers a proof of the whole facts and circumstances averred by them by the oath of Mr Ryrie, instead of limiting the proof to the sixth article of their condescendence, and to their additional condescendence, proceeded from a mere mistake of the clerk in the hurry of business in writing out the interlocutor in the Court, as was explained by the Lord Ordinary at the calling of the cause next day, when the mistake was discovered while the examination was going on;' then he finds that it was necessary, in order 'to enable the pursuers to examine Mr Stewart Ryrie, on the 20th current, on the sixth article of their condescendence, and on their additional condescendence, to pronounce the interlocutor of the 19th specially authorizing them to do so, and to seal up his deposition to lie in retentis; because, although a proof in general had been allowed of the same date of the sixth article of the condescendence, and of the additional condescendence, yet as it is still competent for the defenders to reclaim against the interlocutor allowing a proof, Mr Stewart Ryrie could not have been examined on the 19th without special authority from the Lord Ordinary, and the Lord Ordinary would not have authorized the examination without ordering it to be sealed up;' therefore he found, 'that the proposed examination of Mr Ryrie, with regard to the alleged rei interventus, would be altogether irregular, in respect no proof has been allowed or even demanded by the defenders, who plead rei interventus, and no articulate condescendence of the facts alleged on either side have been given in; and in respect also that it is not so much as alleged by the pursuers, that the facts which they offer to prove on this subject by the testimony of Mr Ryrie may not be known to many other persons. On these grounds, refuses the desire of the representation for the pursuers, and adheres to the interlocutor represented against.'

Against these interlocutors of the Lord Ordinary, in so far as they refused to allow a proof of those articles of the condescendence relative to the subscriptions on the three first pages of the bond, and the time and place of subscribing, the appellants gave in a reclaiming petition. On the other hand, the respondents gave in a petition against these interlocutors, in so far as they allowed a proof of the additional condescendence, and of the sixth article of the original condescen-

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dence. In the reclaiming petition on the part of the appellants it was maintained, that the words of the statute 1696, cap. 15. were quite general, and therefore applied to this deed. But upon advising this petition, with answers, the Court was of opinion that the provisions of the Act 1696 were applicable only to deeds written upon more than one sheet; and they accordingly pronounced an interlocutor refusing the petition, and adhering to the interlocutor complained of.

My Lords,—Against this there was a second reclaiming petition, but the Court, on the 4th of July 1816, pronounced the following interlocutor:—‘The Lords having advised this petition, with the answers, ‘refuse the petition, and adhere to the interlocutor complained of:’ and thus the objection founded on the Act 1696 was finally overruled,—they thought there was no objection to this instrument, and that it did not fall within it. Then, my Lords, a petition was given in for the respondents, by which it was maintained, that the validity of the deed was not affected by either of the statutes 1681 and 1696; and farther, that, at all events, as Paterson had been continued in the agency, and had carried on the transactions of the office to a great extent on the faith of the bond in question, all challenge under the statute was barred *rei interventu*. Upon advising this petition, with answers, the Court being desirous that the facts on which the plea of *rei interventus* was founded should be ascertained, pronounced, on the 23d of February 1816, the following interlocutor, by which they appointed the parties ‘to give in mutual condescendences, in terms of ‘the Act of Sederunt, of the facts which they aver and offer to prove ‘as to the alleged *rei interventus*, and that on or before the first box-day in the ensuing vacation; and to give in mutual answers to the condescendences on or before the second box-day in the same vacation.’

My Lords,—That order was complied with, and their Lordships, on the 4th of July, pronounced another interlocutor, by which they allowed the parties ‘to withdraw their mutual condescendences and ‘mutual answers already given in by them, and appoint the Governor ‘and Company of the Bank of Scotland to give in, on Saturday first, ‘an articulate condescendence, in terms of the Act of Sederunt, of ‘the facts which they aver and offer to prove in support of their plea ‘of *rei interventus*, with a view to an issue on that point being sent to ‘be tried in the Jury Court; and they farther appointed the sixth ‘article of the condescendence for the pursuers, already in process, ‘to be printed.’

My Lords,—This case came again before the Lords of Session, and on the 12th of November 1817 they pronounced this interlocutor. They allowed ‘the depositions lying in retentis to be opened up and ‘printed, reserving all objections against the same; and instead of an ‘issue to be sent to the Jury Court as formerly proposed, before ‘farther answer, allow the parties to bring what other proof they ‘can adduce with regard to the execution of the deed in question,

‘and the plea of rei interventus as stated in the papers; and to both parties a conjunct probation.’ June 4. 1894.

My Lords,—After that, on the joint note of the parties, the Court pronounced as follows:—‘The Lords having heard this joint note, circumscribe the term for proving, appoint parties to print the proof led, and give in memorials thereon on the first box-day in the ensuing vacation, under an amand of L. 4. Sterling; and reserve consideration of the objection to the admissibility of the witness Paterson, until the memorials come to be advised.’

Finally, my Lords, it came again before the Court on the 25th of January 1891, when they pronounced this interlocutor:—‘The Lords having resumed consideration of the remit by the House of Lords, with the mutual memorials for the parties, writs produced, proofs adduced, and whole proceedings in this cause, and advised the whole, repel the reasons of reduction in so far as founded on the statute 1681: Find the defenders entitled to the expenses incurred by them in discussing that part of the cause which relates to that statute; allow an account of these to be given in; and remit to the auditor to tax the same and report; and reserve to the parties all other claims with regard to expenses till the issue of the cause: Find it unnecessary to investigate farther, or to decide the plea founded on a rei interventus: Find it also unnecessary to decide the question as to the opening of the sealed oath of Alexander Paterson; and, allowing it to be received as evidence, appoint the pursuers to give in an articulate condescendence, in terms of the Act of Sederunt, of the facts which they aver and offer to prove as grounds for reducing the deed in question, as unduly obtained by concealment or deception, and that within twenty days, under an amand of L. 2. Sterling.’

My Lords,—It is against these interlocutors that the present appeal has been brought to your Lordships’ House. The effect of these interlocutors is this, that the Court below have decided that the deed is not impeachable either under the statute of 1696 or the statute of 1681. My Lords, the question upon the statute of 1696 was abandoned at the Bar; it was agreed at last, as I understand, that the decision of the Court of Session was right as regarded the statute of 1696,—that this deed having been written on one sheet of paper, the statute was sufficiently complied with by being signed on one page of that deed. It is unnecessary, therefore, to trouble your Lordships with any observation upon it. Had it been a point contended for at the Bar, I should have had no difficulty in concurring with the Court below, that this deed did not fall within the statute of 1696; and if any doubt could have been raised upon the construction of that statute, I apprehend the amount of authorities, and the generally received opinion in Scotland on the construction of that statute, would be most important—that that current of decisions would establish the construction of that statute in Scotland, which I am sure your Lordships would have had great hesitation in disturbing, for we hardly know

June 4, 1804. what might be the consequence of disturbing decisions on the construction of that statute. If your Lordships had been of opinion these decisions had put a wrong construction upon that statute, of course it would have been the duty of the House to express that opinion. However, on the statute of 1696, I apprehend, all question was abandoned at your Lordships' Bar; and if not abandoned, I think your Lordships would have no difficulty in affirming the decision upon that question.

My Lords,—The other question is undoubtedly one of the highest importance, arising upon the construction of the statute of 1681; but, my Lords, before I state to your Lordships that statute, I cannot help remarking on the manner in which this question is brought before this House. It is admitted by these gentlemen, that they subscribed that deed: that is distinctly admitted. It appears, my Lords, that in consequence of that bond having been transmitted to the Bank of Scotland, this gentleman was continued in his agency, and till he fell into difficulties; and when these cautioners and principals were called upon to indemnify the Bank, not the least intimation was given by them of any informality in this instrument. The instrument was sent to Mr Paterson to be duly executed; and your Lordships will find it was returned to the Bank of Scotland in a letter written by Mr Ryrie, who was at that time engaged as a servant or clerk to Mr Paterson, who wrote this letter on the 11th of July 1804, for his employer Mr Paterson, to the secretary of the Bank of Scotland:—‘I wrote you ‘on the 4th current, and have your favours of the 29d ult. and 3d ‘current; the first two bills L.33. 11s., the latter covered one ditto ‘L.48. 6s. and my additional bond of caution, which I now enclose ‘fully executed. I formerly thought it was only necessary to sign the ‘last page:’—it having been returned in consequence of a supposed informality, in only the last page having been signed; that he and the other parties might affix their names to each page, in order that all doubt on that question might be removed. It is returned with this letter written by the clerk of Paterson, and signed by this Mr Stewart Ryrie, one of the attesting witnesses to that instrument which is returned executed. The Bank of Scotland conceiving, therefore, they had a valid security from this gentleman, continued to employ him as their agent and factor until his insolvency, and until several years after the date of this instrument, and then its validity is called into question upon this ground: and, my Lords, I cannot help thinking, with great deference to the Court below, whether it might not have been successfully argued below, that under these circumstances there was that personal exception to Mr Paterson, and to those cautioners, that having acknowledged the execution of the bond, and Mr Paterson being permitted, in consequence of the execution of that bond, to continue as agent of the Bank, it was not competent for them afterwards to set up this fraudulent execution, if it be an improper execution, this fraud on the part of the agent against the Bank, after they had

acted upon his security in the way I have stated to your Lordships. Undoubtedly, supposing your Lordships should be of opinion this inter-locutor ought not to stand, the Court would let the Bank into any proof of circumstances which took place subsequent to that, to render these parties liable; but the first question which occurs to me is, whether it be competent for these parties to allege their own fraud, or their own neglect, or their own omission; or whatever it might be, against the Bank of Scotland, who had been lulled into security by the apparent execution of this instrument, and had, in consequence, permitted Mr Paterson to continue as their agent. I have thought it necessary to state thus much in the outset. This, my Lords, is not alleged to be a fraud, if the instrument be not duly executed; not any imposition practised upon the cautioners, or upon Mr Paterson; no undue conduct is alleged on the part of the Bank of Scotland with respect to the execution. I throw out of my consideration another allegation in this summons of reduction, upon which no decision has yet taken place, nor any proof—I mean that of undue means used towards these sureties, and towards Mr Paterson, in procuring this instrument, which is a subsequent question, if your Lordships should be of opinion that, under the circumstances, this instrument ought not to be impeached on the other grounds; but I say, as far as the execution is concerned, it is proved to have been sent down to Mr Paterson on the part of the Bank, that he and those cautioners might duly execute it; the bond was returned to the Bank apparently duly executed; and therefore no fraud, no imposition, no negligence was practised on the part of the Bank towards these gentlemen with respect to the execution of the instrument.

But then, my Lords, they say that, by the effect of the statute of 1681, they have laid sufficient evidence before the Court below, to shew that this instrument was not duly executed, and that therefore it is a nullity; and that consequently, whatever were the other circumstances, it cannot be enforced.—My Lords, I say this is a most important question, not only as affecting this case, but all the titles in Scotland; for the question is neither more nor less than this, When parties have received from other parties grants and conveyances of estates, apparently duly executed, that execution being intrusted to the grantor, no fraud or imposition practised upon him, Whether it shall be competent, after a lapse of years, for persons who have appended their names to those instruments, thereby attesting that they have seen those instruments duly executed, afterwards to come forward, and by the testimony of those very persons themselves, to destroy the validity of those instruments on which the parties have been enjoying their estates; or giving credit to their agent? I say, my Lords, this is a most alarming question to all possessing property on titles in Scotland. If they have made it out by satisfactory evidence, undoubtedly it is not the province of your Lordships to make laws; we can only adjudicate upon the law as it is; and if there be a defect in the law,—that must be remedied, not by your



June 4. 1824. Lordships sitting in your judicial character, but by your Lordships sitting in your legislative capacity, as a branch of the Legislature.

Now I will call your Lordships' attention shortly to the statute of 1681, and the anterior statutes on the subject of the execution of deeds.—My Lords, one of the earliest statutes upon this subject is the statute of 1540. The title of the Act is, 'That na faith be given to 'evidentis selit, without subscription or notarie.' 'Also, it is statute 'and ordainit, that because menys selis may be aventure be tint, quhair- 'throw gritt hurt may be generit to them that aw the samin, and that 'mennis selis be fenzieid or put to writings efter thair deceis, in hurt 'and prejudice of our Sovereine Lorde's leiges, that therefore na faith 'be given in tyme cuming, to any obligation, bond, or uther writing 'under an sele, without subscriptione of him that awe the samin, and 'witnesses, or ellis, gif the party cannot write, with the subscription of 'ane notar.thairto;' and undoubtedly the object of this and the subsequent statutes, is to protect parties supposed to execute deeds against frauds which may be practised against them.

The next is the statute of the year 1579, which is entitled, 'Anent 'the subscription and inserting of witnesses, in obligations and other 'writs of importance.' 'It is statute and ordained, that all contractes, 'obligations, reversiones, assignations, and discharges of reversiones, 'or eiks thairto, and generally all writes importing heritable title, or 'otheris bondis and obligations of great importance, to be made in 'tyme cuming, sall be subscrivet and seillet be the principal parties, 'gif they can subscryve, otherwise be twa famous nottaries, befor 'four famous witnesses, denominated be their special dwelling-places, 'or some other evident token that the witnesses be known, being present at the tyme, otherwise the saides writtes to mak na faith.'

Then comes the statute on which the objection is taken, the statute of 1681, which I will take the liberty, as it is not very long, of reading to your Lordships:—'Our Sovereign Lord, considering that, by the 'custom introduced when writing was not so ordinary, witnesses insert in writs, although not subscribing, are probative witnessses, and 'by their forgetfulness may easily disown their being witnesses;—your Lordships see it was to guard against the forgetfulness of witnesses,— 'for remeid whereof, his Majesty, with the advice and consent of the 'estates of Parliament, doth enact and declare, that only subscribing 'witnesses in writs, to be subscribed by any party hereafter, shall be 'probative, and not the witnesses insert not subscribing; and that all 'such writs to be subscribed hereafter, wherein the writer and witnesses 'are not designed, shall be null.' Now your Lordships perceive, that in this Act of Parliament it is expressly enacted, 'that writs and 'deeds of this sort, to be subscribed hereafter, wherein the writer and 'witnesses are not designed, shall be null, and are not suppliable by 'condescending upon the writer or the designation of the writer and 'witnesses;' so that undoubtedly it is necessary, in instruments within this Act of Parliament, that the writer, that is, the maker of the instru-

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ment, and the witnesses, shall be designed in the instrument, otherwise it shall be null. Then it goes on: 'It is further statute and declared, that no witness shall subscribe as witness to any parties' subscription, unless he then know that party, and saw him subscribe, or saw or heard him give warrant to a nottar or nottars to subscribe for him, and in evidence thereof touch the nottar's pen, or that the party did, at the time of the witness subscribing, acknowledge his subscription, otherwise the said witnesses shall be reputed and punished as accessorie to forgerie.' Now, as I have already stated to your Lordships, it is obvious, that the object of this Act of Parliament was to secure, as far as possible, the parties who appear to have executed an instrument against any fraud which might be practised against them; the object therefore of the Act was in favour of those persons; and undoubtedly, if the evidence in this case is to cut down the execution of an instrument, it will, instead of protecting against fraud, be the means of producing the greatest frauds, not on the parties executing deeds, but on persons acting on the faith of deeds appearing ex facie to be regularly executed: 'And seeing writing is now so ordinary, his Majesty, with consent foresaid, doth enact and declare, that no witnesses but subscribing witnesses shall be probative in instruments of seising;—and so on: 'And that none but subscribing witnesses shall be probative in executions of messengers, of inhibitions, of interdictions, hornings or arrestments,'—and so on: 'And that in all the said cases the witnesses be designed in the bodie of the writ, instrument, or execution respective, otherwise the same shall be null and void, and make no faith in judgment, nor outwith.'

Having read to your Lordships the Act of Parliament, I will now call your attention to the instrument in question, which is set out in the appendix to the proceedings below. It is a bond by Mr Alexander Paterson, the agent of the Bank of Scotland, and of other gentlemen, whose names I have mentioned to your Lordships, five in number. It is unnecessary for me to trouble your Lordships with the contents of it, but the conclusion of it is in these words:—'In witness whereof, these presents are written upon this and the preceding pages of stamped paper, by Robert Clark, clerk to Alexander Keith, writer to the signet, and subscribed as follows:—videlicet, by us the said Alexander Paterson, James Smith, Patrick Nicolson, George Swanston, and John Sinclair Gunh, all at Thurso the 22d day of June 1804 years, before these witnesses, Phineas Ryrie, cooper in Thurso, and Stewart Ryrie, clerk to me the said Alexander Paterson; and by me the said Henry Bain, at Wick the 23d day of June, year foresaid, before these witnesses, James M'Phaul and Francis Quoys, both merchants in Wick.' Then there are the signatures of the parties, and then there are signatures of those four persons, as witnesses to the signatures, 'Phineas Ryrie, witness, Stewart Ryrie, witness, James M'Phaul, witness, Francis Quoys, witness: And then,

June 4. 1824. my Lords, as I have stated to your Lordships, this bond, ad upon the face of it duly executed in terms of the statute, the Bank of Scotland being in utter ignorance that any informality had taken place in the execution of it, is transmitted in that letter I have read by Mr. Paterson to the Bank of Scotland: but now they say, that notwithstanding ex facie it appeared to be duly executed, they have a right to impeach this instrument, on the ground that the requisitions of the statute were not complied with.

My Lords,—A great deal of argument has been employed, and it has been very ably urged, that supposing it had been established by evidence that this bond had not been duly executed according to the provisions of this statute, still the statute has not expressly made the instrument null and void; and undoubtedly, in the terms of this statute, it does not, as applied to this branch of it, make the deed in express terms null;—it makes it null, if the party executing it, and the witnesses, are not designed duly in the instrument, for it expressly enacts that the deed shall be null; but when it goes on to enact, ‘that no witness shall subscribe as witness to any parties’ subscription, unless he then know that party, and saw him subscribe, or saw or heard him give warrant to a nottar or nottars to subscribe for him, and in evidence thereof touch the nottar’s pen, or that the partie did at the time of the witness’s subscribing acknowledge his subscription; otherwise the said witnesses shall be reputed and punished as accessories to forgerie;’ undoubtedly, in that part of the Act, there is no express declaration, that if they did not know the party, or see him subscribe, and so forth, the deed shall be null; there is no express enactment upon that subject: and undoubtedly a great difference of opinion appears to prevail in the Court below on the construction of that statute; various cases have been cited, from which there appears to be a fluctuation of opinion.

My Lords,—A case may arise in which it may be necessary to discuss that question; but there is an anterior question in this case, whether the evidence is sufficient and satisfactory that the execution did not take place. My Lords, I have taken the liberty of going minutely through this case, which is not usual in a case where it is my intention to conclude with moving the affirmance of the judgment; and I have done it because it is a case of great importance. It was a question competent to the Court below, and is now competent to your Lordships, whether the evidence does establish satisfactorily to your Lordships’ minds, that sixteen years ago this fraud was committed, (for a fraud it was upon the Bank of Scotland, if this deed was not duly executed); where this fraud is set up by the party executing the deed, not that he himself was defrauded, not that he himself was deceived, but that this sort of conduct took place with a view to defraud the Bank of Scotland; and where the parties, at the time, acknowledged that they did duly subscribe that which they affected now to state they did not in the manner required by the Act. The evidence ought,

in my opinion, to be overpowering, supposing the Act to allow of the construction contended for, before a Court upon such evidence sets aside a deed; for the decision must be productive of the greatest mischief. It would, I am persuaded, produce a great alarm in Scotland, if parties, on such a case as this, could be deprived of the benefit they are supposed to derive from deeds properly executed. June 4. 1828.

My Lords,—Who are the witnesses in this case? The only witnesses are the parties who under their own hands have stated, that they saw these gentlemen subscribe, and who are designed in the terms of these Acts of Parliament—I say, that witnesses under such circumstances, if they are competent witnesses, are to have their evidence looked at with the greatest suspicion; and your Lordships ought to be fully satisfied, not only by their evidence, but by corroborative proof. It ought to be most overwhelming evidence before your Lordships attend to such testimony. With respect to Mr M'Phaul, one of the witnesses, he is unfortunately dead: he cannot be produced by the Bank of Scotland to contradict Mr Quoys. Mr Quoys chooses to say,—I will read his deposition to your Lordships,—he says, 'that his name, appended as a witness, is his own writing, to the best of his knowledge.' This is certainly deponing in a most extraordinary manner. He is asked to depone, 'whether the words, "Francis Quoys, witness," appearing at the said bond, is the proper hand-writing of the deponent? depones affirmative, to the best of his knowledge.' Why, my Lords, he could not have any doubt whether it was his writing or not,—the fact could be answered, ay or no, by any honest man—he could know, without any qualification, whether it was his writing or not. 'Can the witness mention the day, and at whose request he subscribed as witness to the said bond? depones, that he cannot condescend upon the day that the said bond was signed by him as witness thereto, but that his subscription was adhibited thereto at the desire of Mr Paterson. Can the witness from recollection say, whether it was in June or July that he so subscribed witness to the said bond? depones negative. Where did witness subscribe the bond? depones, that it was subscribed by him in the shop of William Bain and Company of Wick, of which he was then a partner.' This gentleman, then a partner with this Mr Harry Bain, subscribes it in the shop of William Bain and Company. He is asked, 'whether there was any one present upon that occasion?'—he says, 'there were several people then in the shop, but he cannot tell their names.' He is then asked, 'was Mr James M'Phaul present on that occasion? Yes, he was. Did Mr M'Phaul subscribe the bond also as a witness, at the same time with the deponent? he answers in the affirmative. At whose request did Mr M'Phaul so subscribe? he depones, that he cannot say for certain. Then he is asked, was Mr Henry Bain, whose subscription the deponent is said to have witnessed, present on that occasion? depones, that he does not recollect whether Mr Bain was then present among the many persons who were then in the shop: he did not remark him as having been then present.

June 4. 1894. 'Did the deponent, previous to his signing the bond as above, see Mr Harry Bain adhibit his subscription to it? depones negative. Did Mr Bain, at any time previous to the deponent subscribing as a witness, acknowledge to him that he had subscribed the bond? depones negative. Did the deponent, at any time previous, or at the time of subscribing as a witness, shew Mr Bain the bond? he replies negative,—and so forth.

Now, my Lords, a remark has been made—and I think in such a case the utmost criticism is to be employed on such a deposition—he only recollects that he did not see Bain subscribe; he might have heard him acknowledge his subscription at the very instant he was subscribing it, which would have done; but, my Lords, without going into this minute criticism, here is Mr Quoys—a single witness after the death of the other witness Mr M'Phaul, Mr Quoys having subscribed his own name—comes, after a lapse of many years, and depones undoubtedly, in the year 1818, negatively to Mr Bain's (supposing his testimony goes to that effect) subscribing in his presence; then, I say, it was quite competent for the Court to say, under those circumstances, No, we will, in acting on the credit of Mr Quoys, rather give credit to his signature at the time, than to his testimony at the expiration of so many years, and after the death of the other witness, who might have contradicted him as to that fact, and whose attestation shews he was present: and I think, therefore, the Court have done perfectly right in saying, We think much more credit is due to the attestation of this gentleman to this bond, acted upon by Mr Paterson and the cautioners, than if we were, at the distance of 14 or 15 years after the transaction, to suffer this person to come forward and prove his own fraud, and his own improper conduct, by stating that he had affixed his name to that which was an untruth. The Court below have thought that they were fully justified, as I think they were, in not permitting the testimony of this single witness, particularly when uncorroborated by any collateral circumstance, to cut down attestation as far as regards Mr Harry Bain.

Then, my Lords, with respect to the other part of this transaction, you have the testimony of Mr Stewart Ryrie. Independently of the circumstances connected with the execution of this bond, when you look at Mr Stewart Ryrie's subsequent conduct with respect to this gentleman Mr Paterson—independently of his coming now to negative his own subscription to the instrument—the greatest suspicion attaches to the credit of that gentleman; for he does admit that, subsequently, in his conduct with Mr Paterson, he was a party to the concealment and the fraud practised by this person, Mr Paterson, on the Bank of Scotland. I say, therefore, my Lords, the testimony of this Mr Stewart Ryrie is to be looked at with the greatest suspicion. He says, with respect to Mr Nicolson, that he did not see Nicolson subscribe the bond. Interrogate, If he saw Patrick Nicolson subscribe the said bond? depones, that he did not. Interrogate, If before the witness adhibited his subscription, or at the time of adhibiting his subscrip-

tion, he heard Mr Nicolson acknowledge that the words "Pat. Nicolson" were written by him? depones, that he did not. Your Lordships will perceive that they put the question to him directly, 'If before the witness adhibited his subscription, or at the time?'—which was not the question put to Mr Quoy;—he depones, that he did not hear Mr Nicolson acknowledge that the words 'Pat. Nicolson' were written by him. Interrogate, Whether Phineas Ryrie, whose name the deponent now sees at the bond as an instrumentary witness, saw the obligants subscribe, or heard them acknowledge their subscriptions? depones, That Phineas Ryrie subscribed the bond before the deponent adhibited his subscription; and he is certain, that when Phineas Ryrie so subscribed it, no person was present except the deponent. Then he goes on to state, 'That the bond always remained in the deponent's custody, except on two occasions, when it was taken by Mr Paterson in order to be subscribed by Patrick Nicolson and Harry Bain, on the fourth page; and depones, That after the bond had been subscribed by all the parties except Harry Bain, the deponent one evening called Phineas Ryrie into the bank-office in Thurso, and there Phineas Ryrie adhibited his subscription;' and so forth. Then he goes on to state some other facts relative to this instrument. And with respect to Mr Phineas Ryrie he states, 'That he did subscribe a bond of caution, granted by Mr Paterson and others to the Bank of Scotland, as a witness; but he did not read the said bond, nor was he acquainted with its contents.' Then he is interrogated, 'At what period did he adhibit his subscription to the said bond? depones, That he cannot recollect the precise day, but thinks it may have been towards the end of June or 1st of July 1804. Interrogate, In what place did he subscribe the said bond? depones, That he subscribed it in the banking-office in Thurso. Interrogate, Was Stewart Ryrie, Mr Paterson's clerk, or any other person present with him when he signed the bond? depones, That the said Stewart Ryrie was then present, and no other person.' Then he is asked, 'Does he recollect who were the parties obligants in the said bond? depones, That he does not recollect. Interrogate, When he signed his name to the said bond, did he observe any names of the granters of it, and did he know these granters? depones affirmative. Interrogate, Does he recollect to have seen any of the said persons sign the bond, or did they, or either of them, acknowledge their subscriptions to him?'—Now, my Lords, it has been observed, the question is put to him, 'Does he recollect to have seen any of the said persons sign the bond, or did they, or either of them, acknowledge their signatures to him?' and the answer is negative to both parts of the interrogatory, 'that is, that he does not recollect to have seen any of the said persons sign the bond.' And to the subsequent part of the question, as to the fact whether, to his recollection, they, or either of them, acknowledged their subscriptions to him—that they did not. Cases have been mentioned to shew that the mere non memini should not be sufficient to cut down an

June 4. 1824. instrument to which the party has actually affixed his name as a witness; and this gentleman's testimony on that subject only amounts to non memini. But with respect to this testimony, as well as that of Mr Stewart Ryrie, I think, under the circumstances of this case, their testimony is to be looked at with the greatest suspicion, in the absence of any proof, and in contradiction to their own signatures so many years ago. I am of opinion that the Court were fully justified, with respect to their testimony, as well as that of Mr Quoy, in rejecting that testimony, seeing that the parties have acknowledged their subscriptions; that they have done perfectly right in saying, that the bond is not impeachable upon that ground.

I have been anxious to state to your Lordships, at much greater length than perhaps I ought to have done, the facts of this case, because undoubtedly I did think it one of the most important cases on which I have had the honour of delivering my sentiments since I have attended your Lordships' House; for it is material not only in a case like this, but, with reference to the validity of every instrument in Scotland, it is of the utmost moment. There is remaining that question on which I do not pretend to give an opinion to your Lordships; I mean upon the construction of the statute of 1681, which, whenever the case shall fully call for it, is a question undoubtedly deserving the fullest consideration; I mean whether that statute does, under the circumstances there stated, actually nullify the deed, or whether it only leaves the parties to the punishment of being accessaries to forgery,—if parties can be accessaries to forgery where no forgery is committed, which is another very important question in the cause,—the parties themselves admitting this is their own instrument, and that they executed it with their eyes open. But leaving these important questions to be decided by your Lordships, or by the Court below, whenever a case shall call for it, whatever may be the result of the opinion of the Court on the construction of these statutes, it is sufficient for the present occasion to state, that the evidence in this case has not been satisfactory to my mind, as it was not to the mind of the Court below, as proving that these deeds were not executed with all the formalities required by the statute: and I must, under these circumstances, move your Lordships to affirm the judgment of the Court; and, considering the nature of the question, considering the nature of the proceedings complained of, by parties who executed this deed, with a full knowledge of the contents, I mean as far as this question is concerned, who appended their names to this instrument, and who now come forward, after a lapse of a great many years, through the medium of those very witnesses who at that time solemnly attested the execution of, by putting their names to, the instrument, solemnly to deny that they had seen that done which they attested by their subscription—I do think, considering the nature of the objection raised by this appeal, that your Lordships ought to indemnify the respondents for the costs they have been put to in having this case brought to your Lordships' Bar.

My Lords,—The case undoubtedly must go back again, because there is that other question behind, whether the deed has been obtained by undue means? which I understand is left quite open to the parties after the proceeding on the validity of the instrument shall have been disposed of. The simple question now is, Whether there is sufficient evidence to cut down this deed under the statutes of 1681 and 1696? The case must go back for the appellants to see whether they can make any thing of the other reason of reduction, namely, that they were deceived by the nature of the instrument, and the manner in which it was procured from them. That question undoubtedly will be open on the remit; but as far as the present appeal is concerned, I shall propose to your Lordships that this interlocutor be affirmed, with costs.

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*Appellants' Authorities.*—Stevenson, Nov. 1682, (16,886.); Blair, Feb. 12. 1648, (13,942.); Campbell, Nov. 1698, (16,887.); Syme, Nov. 23. 1708, (16,713.); Walker, June 8. 1716, (16,896.); Young, Aug. 2. 1770, (16,905.); Frank, July 9. 1798, (16,892.); Swaney, Dec. 12. 1807, (No. 7. App. Writ); Richardson, Nov. 28. 1811, (E. C.).

*Respondents' Authorities.*—Valence, July 14. 1709, (16,830.); Ogilvie, Feb. 21. 1711, (ib.); M'Downie, July 1. 1712, (16,931.); 3. Ersk. 2. 14.; 1. Bank. 2. 45.—Robertson, Jan. 7. 1742, (Elchies, voce Writ); Williamson, Dec. 21. 1742, (16,955.); M'Donald, Feb. 14. 1778, (16,942.); Peter, Feb. 19. 1795, (16,957.); 4. Burrough, 2224.; Bell on Testing Deeds, 246. and cases there.

A. MUNDELL—J. CHALMER,—Solicitors.

(Ap. Ca. No. 49.)

MOSES GARDNER, Appellant.—Clerk—Cranston—Adam.

No. 39.

DONALD CUTHBERTSON, (Mennon's Trustee), and Others, Respondents.—Solicitor-General Wetherell—Greenshields.

*Bankrupt—Sequestration—Heritable Creditor.*—Circumstances under which, (reversing the judgment of the Court of Session), a creditor holding a bond and assignation in security of a lease, for payment of a debt due to him by a party whose estates were afterwards sequestered; and who was ranked, and appointed a commissioner, and received payment of his debt, by a transaction with the other creditors, on the footing of being an heritable creditor, was found not liable for the expenses of the sequestration.

IN 1801, John M'Luckie, Walter M'Alpine, Moses Gardner, and John Mennons, acquired right, in equal shares, to a lease of the coal in the lands of Eastmuir, near Glasgow, together with the whole machinery, and entered into partnership for the purpose of

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June 9, 1824. working the coal, under the firm of John Mennons and Company. In 1803, Gardner sold his fourth share of the lease and machinery at L.1440 to M'Luckie, and granted in his favour an *ex facie* absolute assignation. In security of payment of the price, (which was to be made by instalments), M'Luckie granted a bond and assignation to Gardner, whereby he conveyed to him both his own fourth share, and the one which he had so acquired from Gardner, with full power to the latter to sell them, in the event of the price not being regularly paid. In the course of the same year M'Luckie purchased M'Alpine's share, so that he and Mennons now became the sole tenants—M'Luckie to the extent of three-fourths, and Mennons of one-fourth. In December thereafter, Gardner raised and executed an inhibition on his bond against M'Luckie; and in January 1804, M'Luckie sold his three-fourth shares to Mennons, who thereupon became bound to relieve M'Luckie of the debt due to Gardner; so that in this way Mennons became sole tenant. Between that period and 1806, M'Luckie had paid up a part of the debt, which left a balance of L.814 due to Gardner. M'Luckie became bankrupt, and his estates having been sequestrated, Gardner claimed, and was ranked as a creditor for the above sum. Thereafter, in 1807, Gardner, founding upon his bond and assignation, and the obligation by Mennons to M'Luckie, raised an action against Mennons, and also against the trustee of M'Luckie, on the dependence of which he executed an inhibition, in July of that year, against Mennons. At the same time M'Luckie's trustee also raised an action, and executed inhibition against Mennons. Gardner then obtained decree for the amount of the debt, and executed diligence against Mennons, who having been rendered bankrupt, Gardner, founding upon his bond and disposition, decree and diligence, concurred with Mennons in applying for a sequestration. This was awarded, and the late William Cuthbertson was elected trustee, and Gardner was appointed one of the commissioners. Besides the above debt, Gardner was also a creditor of Mennons for L.43. 18s. 5d. upon an open account, and for which he was ranked.

After the trustee had taken possession of the colliery, and worked it for some time, the creditors resolved to bring it to sale. It was accordingly exposed under articles of roup, (which were subscribed by Gardner as one of the commissioners), and by which it was stipulated, that the price should be payable to the trustee. Under these articles the works were sold, on the 30th of August 1809, to Charles Hamilton, at L.1680, of which L.500

were paid. A claim of preference was then made by Gardner over the price, for payment of his debt of L. 814, with interest; and after consulting Mr Ross, the Dean of Faculty, the trustee and commissioners, on the 14th September 1809, made the following resolution:—‘The trustee and commissioners upon the sequestrated estate of the said John Mennons being met, along with Samuel Shanks, one of the creditors, the agent in the sequestration, and Mr Peter Paterson, writer in Glasgow, and having consulted with them respecting Mr Moses Gardner’s claim of preference over the Eastmuir coal-works, in virtue of the bond by John M’Luckie and inhibitions used thereon, are unanimously of opinion, that Mr Gardner’s claim is preferable over said works, to the extent of the balance thereby owing, being L. 814 Sterling, and interest thereof since the 1st day of January 1806; and therefore they authorize the trustee, so soon as he receives the bond for the balance of the price of the coal-works from Charles Hamilton the purchaser, to convey the same to Mr. Gardner in payment of his preferable claim. Mr Gardner at same time being bound to concur in the conveyance to the purchaser, and to renounce and discharge his debt, and assign his bond to the trustee. Mr Gardner is also to settle the difference between the sum in said bond and his claim, either by cash, or bills with sufficient security.

‘Mr Andrew M’Kendrick, the trustee on John M’Luckie’s estate, also hereby becomes bound to remove and discharge all inhibitions used against the works at John M’Luckie’s instance, reserving all preferable claims, either by said John M’Luckie against said John Mennons, or by said John Mennons against said John M’Luckie, which it is hereby understood and declared shall in no degree be touched or infringed upon.’

Accordingly, on the 11th October 1809, Cuthbertson, the trustee, executed an assignation of a bond by Hamilton for L. 1180, (being the balance of the price), in favour of Gardner, who, on the other hand, granted an assignation in favour of the trustee of the bond and assignation by M’Luckie, with the relative inhibitions both against him and Mennons, and the decree and subsequent diligence obtained and executed against these parties, and substituted the trustee in his full right of the premises. For the difference between the amount of Hamilton’s bond and the debt due to Gardner, the latter became bound, along with a cautioner, to account to the trustee. At this time (as was alleged by Gardner) the trustee had sufficient funds in his hands to pay the whole expenses of the sequestration which had been then incurred,

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William Cuthbertson, the trustee, having died, his son and heir, Donald Cuthbertson, one of the respondents, was elected in his place; and various expenses were thereafter incurred, part of which arose out of an action instituted against Gardner, concluding for an accounting of the balance due on Hamilton's bond; but which action was ultimately abandoned. These expenses amounted to L. 584. 14s. for payment of which the trustee brought an action, in which he concluded, that he was 'entitled to be relieved of the said sums of expenses, and interest thereof, either by the said Moses Gardner, the creditor who had obtained the price of the lease, or by the creditors at large, in such proportions and on such principles as shall be fixed by our said Lords.'

In defence, Gardner admitted his liability, along with the other creditors pro rata, so far as regarded the personal debt of L. 43. 18s. 5d.; but he denied his liability in regard to the debt of L. 814. Lord Gillies, 'in respect of the decision pronounced by the Court in the case of Goodwin against Brown, 1st February 1815, found, that the pursuer is entitled to be relieved at the hands of the defender, Moses Gardner, an heritable creditor on the sequestrated estate of John Mennons, or who, at least, claimed and obtained a preference over the same in virtue of his grounds of debt and the diligence used by him, and drew full payment of his debt in consequence thereof, of the whole expenses incurred by the pursuer as trustee in the process of sequestration libelled: Found the said defender liable to the pursuer in the sum of expenses now pursued for, with interest, as libelled, and decerned accordingly.'

Gardner having reclaimed, the Court, on the 13th November 1819, adhered; and on advising a second petition, with answers, they again adhered, 'in so far as the same respects the petitioner being found liable in the expenses of the sequestration in process, and remitted to the Lord Ordinary to hear parties on the amount of the said expenses.'\*

Gardner then appealed, and maintained,—

1. That as the trustee had entered into a transaction with him, whereby he had purchased the bond and assignation and relative diligence, together with the debt itself, at a certain price, and by which the trustee was put into his place, and Gardner thereby became disconnected with the estate, except to the extent of the personal debt of L. 43. 18s. 5d. he could not, after such a

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\* Not reported.

transaction, be made liable for any of the expenses corresponding to the debt of L. 814. June 9. 1824.

2. That, supposing the case of *Goodwin v. Brown* was a well founded decision, it did not support the interlocutors, because in that case the heritable creditor had no power of sale, and consequently could not realize payment of his debt, except by means of an adjudication and ranking and sale, or by a sequestration; and that as the creditor had availed himself of the latter of these processes, there might be some equity for obliging him to pay the expenses; but in the present case Gardner had a power of sale, under which he could, at a very trifling expense, have recovered payment of his debt, and it was therefore not equitable that the expenses of the sequestration should be thrown upon him. That, however, the decision in the case of *Goodwin* was not authorized either by the common law or by the Sequestration Act. At common law, a creditor having a real security is entitled to recover payment of his debt and expenses out of the estate of his debtor, and cannot be burdened with the expenses of any proceedings which may be adopted by the other creditors; and by the Sequestration Act the estate is conveyed to the trustee under the burden of the heritable debts, so that he is only proprietor under deduction of them, and consequently must pay them to the respective creditors free of all expense. And,

3. That, at all events, Gardner could not be made liable to a greater extent than in proportion to the amount of his debt, along with the other creditors.

On the other hand, it was contended by the respondents,—

1. That as it was enacted by the Bankrupt Act, that the estate should be a fund of division only after payment of all charges, it was plain that it was the intention of the Legislature that these charges should, *ante omnia*, be paid out of the estate, and that the residue should then be divided among the creditors, according to their respective preferences; and therefore, if, instead of first deducting these charges, the fund was divided among the creditors, they must be liable to repeat to the extent of the amount of them; and consequently, even an heritable creditor was liable for payment of these expenses; and therefore, as in the present case Gardner had drawn the whole funds, while the other creditors had received nothing, it was equitable that he alone should be bound to pay the expenses; and accordingly this point had been so decided in the case of *Goodwin*.

2. That even supposing that were an erroneous decision, Gardner did not possess the character of an heritable creditor, because

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the bond and assignation of the lease and machinery could not confer on him a real right without actual possession, which he had not enjoyed; and that he had passed from the inhibitions against M'Luckie, seeing that he had availed himself of the obligation undertaken by Mennons, and concurred in the sequestration.

3. That the arrangement with the creditors had proceeded on an error in point of law, by supposing that Gardner had a preference, when in point of fact he had not; and, at all events, as it was made with him on the footing of his being entitled to a preference as a real creditor, he could only take advantage of it subject to and under the burden imposed by law, of paying the expenses of the sequestration.

The House of Lords found, 'That the appellant is not liable to any part of the expenses of the sequestration, in respect of the sum of L. 814 received by him under the arrangement between him and the trustees and commissioners of the sequestrated estate of John Mennons; and therefore it is ordered and adjudged, that the interlocutors complained of be reversed, but without prejudice to the claim of the trustee in the sequestrated estate for any contribution from the appellant towards such expenses, by reason of the debt of L. 43. 18s. 5d. due to the appellant from the said John Mennons.'

LORD GIFFORD, after mentioning the circumstances of the case, and making some observations on the extreme importance of the points which had been stated, observed that, in his opinion, from the peculiar circumstances of this case, which he would afterwards notice more minutely, their Lordships were not called upon actually to decide these questions.

In considering the case it was important to bear in mind, that M'Luckie's estate had been sequestrated; the appellant's claim of preference upon the estate, by virtue of his assignation and inhibition, had been allowed; and that subsequently the estate of Mennons had been sequestrated, and a claim had been lodged by his trustee upon the estate of M'Luckie, in consequence, as the respondents themselves stated, of the preference claimed by the appellant upon the estate of Mennons. In 1809 the coal-works were sold for upwards of L. 1600 to Mr Hamilton, so that the sum which he had to pay was a much larger sum than was due to the appellant; and therefore all the arguments founded on the exorbitancy of the original price stipulated for by the appellant came to nothing. It was admitted that the appellant had a security, and that he claimed a preference over the whole coal-works by virtue of his assignation and inhibition. That his concurrence to the sale was necessary in some shape or another is indisputable. Ac-

cordingly, an arrangement was entered into on the part of the trustee on Mennons' estate, after taking the opinion of Counsel, as it is alleged, but which is of no importance; and thereafter an agreement was made, which forms the important part of this case. It recites the appellant's claim of preference to the extent of £.814, and interest, being the remainder of the instalments due on his original bond from M'Luckie; and proceeds on the statement of the absolute claim of lien or preference which the appellant had, not only on the coal-works themselves, but over the proceeds. This agreement was soon afterwards carried into effect. Hamilton paid £.500 to the trustee to account of the price, and assigned his bond to the appellant in satisfaction of his preference. Whether right or wrong, the trustee was a party to, and assenting to this measure. The agreement is recited in the assignation. It gives to the appellant liberty to pay himself out of the proceeds of the bond, accounting to the trustee for the residue. All this is also entered in the sederunt book. The appellant then executed assignments of all his securities and diligence, in pursuance of the same agreement, to the trustee, so as to enable him to convey the coal-works to the purchaser. The appellant then received the amount of the bond, out of which he retained a sum to the extent of his preference; and he seems to have kept the balance, which became the subject of a litigation, but forms no question here. It is next extremely important to see what the respondents themselves state. (His Lordship then read a passage from one of their pleadings in the Court of Session, in which they represented the advantage which the appellant took of the situation of the trustee and creditors, after the contract was made with Mr Hamilton, and which they stated they were compelled to let the appellant have at his own terms.) This rather tells against the respondents. It shews they were quite aware of his having some claim, and that it formed a consideration in inducing him to grant his concurrence to the sale.

Is it then possible that all this can be now again opened up, after many years are elapsed too, and that because certain things have occurred long subsequent to the agreement? Besides Gardner's claims, there were also other preferable creditors on Mennons' estate. These claims also were paid, and considerable sums appear to have been received by the trustee. But the present claim by the trustee is in respect of the proceedings chiefly incurred subsequent to the arrangement in 1809; and yet it is said this makes no difference. It appears that the trustee, in the first instance, raised his action against all the creditors, concluding against all of them pro rata. The action was afterwards amended, by concluding against the appellant alone, and for all expenses, on the authority of the case of Goodwin against Brown in 1815. The opinion of the Lord Ordinary goes entirely upon that case; and if this present case were to be decided upon that authority, undoubtedly the appellant would be liable to the whole. The agreement, however, appears to have been lost sight of in the Court

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below. With regard to the authority of that case, great doubt appears certainly to have been entertained by the profession at large, and particularly by that most enlightened author, (who, though no authority for their Lordships, is still to be looked to with the greatest deference), namely Mr Bell, in his excellent work; and if the point were to come before the Court again, it would require considerable reconsideration. A great deal of ingenious argument has been used by the respondents' Counsel, as to Mr Gardner's right to preference or not; but whether he is or is not entitled to it, they dealt with him and he with them on that footing. Instead of driving him to try his right, the trustee very prudently entered into the arrangement in question, and they cannot now rescind that agreement. According to the argument which has been maintained, if the expenses had amounted to L.800, he must pay back every shilling he had received under the agreement, in the shape of costs. This could not possibly have been contemplated. It would leave the person in a worse situation than if he had never acceded to the arrangement, and had, instead of doing so, relied upon his right of preference, and his claims upon M'Luckie's estate. Here he suffers L.500 to be appropriated to the purposes of the sequestration; departs from all his remedies, both against the works themselves, and the estate of M'Luckie: and yet is it possible, that if the expenses exceed the whole price, the appellant is, without any stipulation or provision of any sort on the agreement, to be totally deprived of every farthing of his debts? The bankrupt statute, which has been so much dwelt upon, must be very strong indeed to support so monstrous a proposition. The statute says, 'the residue, after paying all charges.' But there is another section, 33. (His Lordship then read it). This clearly points out what the statute contemplated in regard to the protection of preferable claims. Without, therefore, wishing voluntarily to impugn the decision of Goodwin and Brown, which, however, ought to have the fullest reconsideration whenever the question actually comes before their Lordships, the agreement puts this case out of all question; and therefore the creditors cannot go back and make him refund. The fact of his being the concurrent creditor in the sequestration is not material, for still the principle of the creditors dealing with him remains. These interlocutors must therefore be reversed. It must be without prejudice, however, to the trustee's claims on the appellant, in respect of his private or simple contract debt of L.43. Indeed the appellant admits and consents to pay what proportion he is liable to in respect of this debt.

EVANS and SHEARMAN—J. BUTT,—Solicitors.

(Ap. Ca. No. 52.)

ALEXANDER MURRAY, Esq. Appellant.—*Murray—Walker.* No. 40.  
 EARL of SELKIRK, and MAGISTRATES of KIRKCUDBRIGHT, Respondents.—*Shadwell—Miller.*

*Salmon-Fishing—Stake-Nets—Statute 1563, c. 68.—Res Judicata.*—An action having been brought against certain parties who had rights of salmon-fishing in the river Dee and had placed yairs within tide-mark, to have it found that they had no right to do so; and the Court of Session having found that they fell within the exception of the statute 1563, c. 68. as being situated within the water of Solway: and thereafter the same parties having erected stake-nets at the same place; and a bill of suspension and interdict against their doing so having been refused; and a declarator having then been brought to have it found that they were not entitled to fish with stake-nets; and the Court of Session having sustained a defence of res judicata, in respect of the decree in the former action and in the suspension;—the House of Lords reversed the judgment sustaining that defence, and remitted to the Court of Session to make further inquiries as to whether the yairs were within the water of Solway or not.

IN 1804 the trustees of the late James Murray of Broughton, father of the appellant, brought an action against the trustees of the late Thomas Earl of Selkirk, and the Magistrates of the burgh of Kirkcudbright, setting forth, that as trustees of Mr Murray they were proprietors of certain salmon-fishings in the upper part of the river Dee, in the county of Kirkcudbright; and that although it was enacted by the statute 1563, ch. 68. ‘that all cruives and fish-dammes that ar within salt water that ebbis and flows bee all utterly destroyed and put down, alsweil they that perteneis to our Sovereign Lord as utheris throw all the realme,’ yet the Earl of Selkirk and the Magistrates of Kirkcudbright thought proper to erect and use cruives and yairs, for the purpose of catching salmon in the lower part of the river Dee, where the sea ebbs and flows, whereby the pursuers are not only injured in their mode of salmon-fishing, by the salmon being prevented from getting up the river, but also the free navigation in several places completely interrupted, to the great hurt of the pursuers, who are proprietors of two harbours at Tongland and Tarff, farther up the river than the erections; and that although this was both contrary to the statute and to the common law, yet these parties persevered in fishing in this manner; and therefore they concluded, ‘that they should be decerned and ordained forthwith to remove and demolish the said fishings by cruives and yairs or any other manner erected by them, or under their direction, in that part of the river Dee where the sea ebbs and flows, and prohibited and discharged

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‘ from erecting any such works in time coming ; and also decern-  
 ‘ ed and ordained, conjunctly and severally, to make payment to  
 ‘ the pursuers of the sum of L. 5000 sterling, as the damages they  
 ‘ have already sustained by the said illegal mode of fishing.’

In defence it was alleged, that as there was a special exception in the statute, by which it was declared, that ‘ this Act in no ways be extended to the cruives and yairs being upon the water of Solway ;’ and as the river Dee disembogues itself into the firth or water of Solway, and the tides of the Solway ebb and flow where the yairs are placed, the respondents had a right, under the statute itself, to fish with yairs at the point where they were situated : that accordingly possession had been enjoyed of this species of fishing for more than three centuries and a half under their respective titles, which, although it might not afford a prescriptive right in opposition to the statute, yet demonstrated that this part of the Dee was considered as forming part of the water of Solway, and so within the exception : that, besides, the yairs, from a peculiarity in their construction, were not injurious to the fishings of the superior heritors, nor to the navigation of the river.

To this it was answered, that the water of Solway meant not the firth but the river Solway ; and that, even supposing it should be considered as meaning the firth, yet in point of fact the Dee did not flow into that firth, but into the Irish Sea ; and in support of this assertion reference was made to numerous ancient geographers, historians, and poets, from the time of Ptolemy downwards.

Lord Balmuto, on advising memorials, assoilzied the respondents ; and the Court, without taking any proof as to the fact of the yairs being within the water of Solway, adhered, on the 23d May 1807, to the effect of finding that the yairs were within the exception of the statute ; but remitted to the Lord Ordinary ‘ to hear parties with regard to any obstruction that may arise to the navigation of the river from the cruives and yairs, or other erections of the defenders, and to do thereanent as his Lordship shall see cause.’ A proof was then taken in relation to this matter ; but the action was allowed to fall asleep.

Between that period and 1817 the respondents erected stake-nets on the Dee, also within the tide-mark, against which the appellant, and the trustees of his father, presented a bill of suspension and interdict, on the ground that the respondents had no right to fish in this manner.

On the other hand, the respondents maintained, that the ques-



tion of right had been decided by the judgment of the 23d May 1807; and accordingly the bill was refused, with expenses. June 9, 1824

The trustees of the late Mr Murray having then divested themselves in favour of the appellant, he raised an action of declarator against the respondents, in which he stated, that ‘by the common law of this realm, as well as by various Acts of Parliament, the proprietors of salmon-fisheries are not at liberty to exercise the same, or to take salmon in rivers or firths where the tide ebbs and flows, otherwise than by net and cable, or in such other ways as may have been sanctioned by immemorial usage: That nevertheless the Right Honourable Thomas Earl of Selkirk, and the provost, magistrates, and councillors of Kirkcudbright, as representing the community of said burgh, have, by themselves, their tenants, or servants employed or authorized by them, within these last few years erected a number of stake-nets, and other fixed machinery, for the purpose of catching salmon, not formerly used in the river, upon the sands adjoining to the river Dee, and in the river itself, opposite to their respective lands within the stewartry of Kirkcudbright, and thereby taken great quantities of salmon, contrary to law, and to the great hurt and prejudice of the pursuer, the said Alexander Murray, and the other proprietors of salmon-fisheries in the higher parts of the said river Dee, and also very much to the prejudice and injury of the navigation of said river;’ and therefore concluding, ‘that it ought and should be found and declared, that the said defenders have no right, by themselves, or others employed or authorized by them, to erect stake-nets or other machinery for catching salmon not formerly used within the river Dee, either in that river or on the sands adjoining thereto, between high and low water marks;’ and therefore concluding for decree of removal and interdict, and for damages.

In defence against this action the respondents maintained, that as the former summons concluded to have it found that they had no right to fish by means of cruives and yairs, ‘or in any other manner whereby the fishings of the pursuers may be in any way injured, or the free navigation of the river interrupted;’ and as the Court had, by the judgment of 23d May 1807, assoilzied them from the conclusion so far as it regarded the mode of fishing, and had allowed a proof as to the interruption of the navigation, and had subsequently refused a bill of suspension in regard to the point of right, the new action was barred by the defence of *res judicata* and *lis pendens*: that, farther,

June 2, 1821. Stake-nets were merely an improved species of yairs; and therefore, if the question were open, they were entitled, under the exception in the statute, to fish by means of them. This case came before Lord Gillies, who reported it to the Inner-House, 'in respect that the defenders found on certain judgments of the Inner-House, as affording them the defence of *res judicata* against the present action;' and accordingly their Lordships, on the 19th November 1818, sustained the defence of *res judicata*, absolved the respondents, and found them entitled to expenses, 'in respect of the decrees pronounced in the former process of suspension between the same parties who are parties to the present process.' Thereafter the original action having been awakened, and the proof having been reported to the Inner-House, their Lordships, upon the 6th July 1821, absolved the respondents, and found them entitled to expenses.\*

Against the judgments, both in the first action, and against the judgment in the second sustaining the defence of *res judicata*, the appellant entered separate appeals, and maintained that they were erroneous,—

1. Because yairs and stake-nets erected in the channel of a river, or on the sands of a river covered by the tide at high water, are illegal, and the yairs and stake-nets of the respondents were placed in such a situation. In support of this proposition, it was contended, 1st, That by various statutes the employment of cruives and yairs on the sands and rivers within the tide-way of the sea, had, previous to 1563, been prohibited without any exception: That by the statute of that year it was not only not intended to admit of any exception to this general prohibition, but, on the contrary, it was enacted, that if the officers to whom the execution of the Acts was committed should be negligent in performing it, they should be liable for the penalties of the statutes: That, however, as the river Solway formed the boundary between Scotland and England, and these countries were then frequently engaged in hostilities, and as the officers might not be able to perform their duty on that river, it was considered unreasonable that they should be responsible for the erection of yairs on the Solway; and therefore it was provided, 'that this Act in no ways be extended to the cruives and yairs being upon the water of Solway;' thereby meaning, that it was only the provisions of this special Act, and not those previously passed prohibiting cruives and yairs generally, which were to be excepted

\* See I. Shaw and Ballantine, No. 132.

as to the Solway, and not that it should be lawful to erect cruives and yairs on that river. That, at all events, and supposing that it had been intended to allow cruives and yairs to be placed on the 'water of Solway,' this exception from the general rule, must have been made by the Legislature on the footing that, as the fishings on the English side were free, it would be unjust towards the Scotch to prevent them fishing on their own side; therefore it was plain, that the Legislature could not have meant to extend the exception to the firth, and to all the adjacent rivers, seeing that the reason of the enactment could not apply to them, but only to the river Solway, and consequently not to the Dee. And, 2d, That assuming that by the 'water of Solway' was meant the firth, still it was proved by the various authors, ancient and modern, which had been referred to in the Court of Session, that both before and after, but especially about the period of the Act 1563, the Firth of Solway was held to terminate either at Bowness or at Skinburness, points which were about 25 miles south-east from the mouth of the Dee; and consequently that river did not flow into the Solway Firth, but into the Irish Sea, and could not fall within the exception of the statute.

2. Because stake-nets were different in species and effect from cruives and yairs, and consequently could not be protected by the exception in the statute. In reference to this point it was stated, that although a yair in its external appearance somewhat resembles a stake-net, in so far as each of them is formed with wings made of stakes and wicker-work, or with nets extended on the stakes, yet the mode in which the fish were caught was essentially different; because it was necessary, where a yair was employed, that a fisherman should be stationed with a moveable instrument connected with a bag, in which he could not take more than one salmon at a time, whereas a stake-net was a fixed machine, not requiring the intervention of human agency to its operation, and which was quite sufficient of itself to catch the salmon in numbers which could only be limited by the extent of the chambers or traps.

3. Because the plea of *res judicata* was untenable, seeing that the first action had reference merely to the right of the respondents to fish with yairs, (there being at that time no stake-nets erected); and consequently the decision in that action could not afford any plea of *res judicata* against the action relative to the stake-nets; and the refusal of the bill of suspension and interdict was merely a judgment on the question of posses-

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June 9, 1834. aion, which could not prevent the appellant from bringing an action of declarator to have the point of right ascertained. And, 4. Because the proof which had been taken established that the yairs and stake-nets were injurious to the navigation of the river.

On the other hand the respondents maintained,—

1. That there was no foundation for the construction attempted to be put upon the statute by the appellant; and that, as the words were in themselves free of all ambiguity, it followed, that if the yairs were de facto situated within the water of Solway, they were not liable to be removed, seeing that it was expressly declared that the prohibition should not apply to them.

2. That it was proved by various ancient and modern writers, that in the Scottish language the word water was often made use of synonymously with firth; that the Solway Firth extended to the Dee, and that the yairs were placed within the influence of its tides.

3. That the general question as to the right of fishing had been raised under the original action; and therefore, if the judgment in that case was affirmed, the second action would of necessity be excluded. And,

4. That the proof established that the erections were not injurious to the navigation of the river.

The House of Lords, in the appeal relative to the question of *res judicata*, found, That the defence of *res judicata* is not sustainable; and therefore it is ordered, that the said interlocutors complained of in the said appeal be, and the same are hereby reversed; and it is further ordered, that the cause be remitted back to the Court of Session in Scotland, to do farther therein as is consistent with this finding, and as is just. And in the original action their Lordships ordered, that the cause be remitted back to the Court of Session, to inquire, in such manner as to them shall seem meet, whether the cruives and yairs complained of are situated upon the water of Solway, and protected by the proviso in the statute 1563, c. 68. ? And it is further ordered, that, with this direction, the said Court do review the several interlocutors complained of, and proceed upon such review as to the Court shall seem just and meet.

**LORD GIFFORD.**—My Lords, There are two cases in which Alexander Murray is the appellant, and the Earl of Selkirk and others respondents. In the first case, an action was brought in name of the trustees of the deceased James Murray against the respondents; and the summons stated, that the trustees, the pursuers in the action, were proprie-

tors of certain fishings of salmon in the upper part of the river Dee, called Tongland, which they hold by express grant from the Crown. It then set out the provisions of the Act of 1563, to which I will call your Lordships' attention presently; and then it stated, that notwithstanding the enactment of that statute, the respondents, the defenders in that action, had thought fit to erect and use cruives and yairs, for the purpose of catching salmon in the lower part of the river Dee, where the sea ebbs and flows, whereby not only the pursuers foresaid are injured in their mode of salmon-fishing, by the salmon being prevented from getting up the river, but that also the free navigation of the river was prevented.

My Lords,—Various defences were put in to this action, but the main defence was, that by the exception in the statute of 1563, the respondents were fully justified in erecting these cruives and yairs upon this part of the Dee; and they relied upon the long enjoyment of cruives and yairs in the position in which they said these cruives and yairs were placed for use.

The case came before the Lord Ordinary in the month of December 1805, and Lord Balmuto, who was the Lord Ordinary, pronounced the following interlocutor:—‘ Having considered the mutual memorials for the parties, plans produced, and whole process, assoilzies the defenders simpliciter, and decerns.’ My Lords, a representation against this interlocutor was afterwards refused; there was a petition to the Court, and the interlocutor of the Lord Ordinary was adhered to by an interlocutor of the 22d May 1807. My Lords, afterwards, however, on the 18th May 1808, there was a remit to the Lord Ordinary, to take proof, with respect to the injury which it was supposed these cruives and yairs caused to the navigation; and the proof was accordingly taken, under the authority of the Lord Ordinary, in the year 1810.

My Lords,—The cause then slept for a great many years, but I believe in consequence of the decision of the Tay cause, which was before your Lordships' House, the proceedings were revived; and in the year 1819 the Lord Ordinary pronounced this interlocutor, upon the proof which came before him with respect to the injury of the navigation:—‘ In respect the proof is in some degree contradictory, appoints parties' procurators to give in mutual memorials upon the question at issue, with the import of the proof as applicable thereto, to be seen and interchanged;’ and then, on the 23d January 1820, the Lord Ordinary issued the following order:—‘ The Lord Ordinary, at the joint desire of the Counsel for the parties, makes avizandum with the cause to the Lords of the First Division of the Court; appoints the parties severally to prepare, print, box, and lodge informations, and put copies thereof into the Lords' boxes, in order to be reported, and that within ten days.’

On advising these informations, upon the report of Lord Balmuto, the Lords pronounced this interlocutor:—‘ They sustain the defences,

June 9, 1824. 'and absolve from the conclusions of the libel, and decern: Find the pursuer liable in the whole of the defenders' expenses incurred in this process; allow an account thereof to be lodged; and remit the same, when lodged, to the auditor, to tax and report.' Against this interlocutor, my Lords, the appeal is brought in the first case. It will be necessary for me just to state to your Lordships in the present stage, that in the year 1817 a second action was brought by Mr Murray against the same respondents, complaining of a great number of stake-nets and machinery, which, he complained, had been put down in this river, in prejudice of his fishery. The respondents in answer contended, that the decision of the former action was a judgment against the appellant in the same identical matter, and that that being res judicata, was decisive. I shall call your Lordships' attention to that when I have made the observations which occur to me upon the first appeal.

My Lords,—The great question in this cause is, Whether, under the statute 1563, which is admitted on all hands to be still in force, the cruives and yairs which have been set up by the defenders in this part of the river Dee were protected by the exception in that statute? It is well known to your Lordships how very careful the Legislature has been of the protection of the salmon-fishery, and a variety of Acts have been passed upon that subject. I do not feel it necessary to call your Lordships' attention to these statutes further than the statute of 1563. By that statute 'it is statuted and ordained, that all cruives and fish-dams that are within salt waters that ebbis and flowis, bee all utterly destroyed and put downe, als well they that portenis to our Sovereine Lord as uthers, throw all the realme; and anentis cruives in fresh waters, that they be made in sik largenesse, and sik dayes keeped as is contained in the Acts and Statutes made thereupon of before, with this addition.' Then it concludes with this proviso:—'Providing always, that this Act in naways be extended to the cruives and yairs being upon the water of Solway.' My Lords, the reason of that exception is, I think, pretty evident, that being the boundary between England and Scotland; the English catching as many salmon as they could on their side, it was thought proper to allow the Scotchmen to do the same. My Lords, the defenders say, that with respect to these cruives and yairs complained of in the year 1804 in this action, they had been in the enjoyment, and had been in the legal right of having them there, for upwards of a century. I will read to your Lordships the manner in which they state their right. It is very important to the consideration of this case. They admit that no usage will prevail against the positive terms of an Act of Parliament. 'They explicitly admit that no usage, however long and uninterrupted, is available against a public law. Their plea is, that the saving clause in the statute authorizes them to erect yairs on the river Dee; and they refer to possession and usage only as collateral evidence that they do not misinterpret the statute. If this plea be well founded, your Lordships must hold that the respondents are entitled to erect as

'many yairs, of whatever' construction, as they may think proper; for  
'in doing so they merely exercise a privilege which the law of the  
'country has expressly bestowed upon them.' So that your Lordships  
perceive they do not put their defence on possession merely. They  
do not say, that their possession is such that it can prevail against the  
language of an Act of Parliament; but they say, that it is evident that  
the place where these cruives and yairs were erected, was part of that  
water of Solway so described in the exception of the Act of Parlia-  
ment.

My Lords,—Then the question was as to the extent of the water of  
Solway; and undoubtedly a great deal of writing has been employed  
in the most ingenious quotations from poets and historians, and authors  
of all descriptions,—one to prove the extent of the Solway to include  
the water of Dee, and others to exclude it; but no legal evidence  
whatever—no proof has been adduced, either from the old writers in  
Scotland, or in any issue, to ascertain the extent of the water of Sol-  
way; and on what foundation the Lords of Session have found that  
the defendants' cruives and yairs were protected, I am unable to state  
to your Lordships. My Lords, undoubtedly the pursuer in this case  
offered to prove that the cruives and yairs were not situate on the  
water of the Solway: the question being raised, whether they fell un-  
der this exception or not, they offered to prove that the place where  
they were, was known as the river Dee—that the Dee, in fact, did  
not discharge itself into the water of Solway—and that cruives situate  
within the river Dee would not fall within the exceptions granted to  
cruives being upon the water of Solway. In answer to this, the res-  
pondents say, that the cruives and yairs are protected by the exception  
of the statute of 1563, as being upon the water of Solway, which they  
say extends where salt water ebbs and flows; and they say, that if they  
are situate on what has always been considered the river Dee, the  
river Dee flowing into the Solway—if they are in that part where the  
tide ebbs and flows, they are on the water of Solway, and so within the  
proviso of this Act of Parliament. But, my Lords, I must confess I  
have felt some difficulty on the case, as it is now presented, to say  
whether this place is or is not on the water of Solway. As I have  
stated to your Lordships, we have quotations, but we have no evidence  
on which we can have reliance as to that which is to be deemed and  
considered as the extent of the water of Solway. The defenders'  
case rests upon that; they admit that their usage will not do against  
the Act of Parliament; they say that that usage is (and it undoubtedly  
is) very important evidence, when you come to consider whether those  
cruives and yairs are on the water of Solway or not; for they being  
admitted to be there certainly at the time of the action brought, there  
is, they say, strong evidence that, in the understanding of all persons,  
that was to be considered as the water of Solway. It is to be recol-  
lected there are cases referred to of other rivers flowing into this  
water of Solway, as it is called, higher up in the junction between

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June 9. 1824. Scotland and England. Cases have occurred, and it has been found that the yairs had not been lately placed. But, my Lords, in the view I have of this case, thinking, as I do, there must be a farther inquiry before we proceed to a final decision upon it, I should be very unwilling to prejudice this question by any observations upon it or the cases which have been referred to; for, in my humble judgment, it is impossible for this House to arrive at a safe conclusion upon this case, unless the question be first decided whether those yairs be or not upon the water of Solway. If they be, then their defence is sustained, that they come within the exceptions of this Act of Parliament; if they be not, it will be for the Court of Session to say whether they are protected by the terms of this Act of Parliament. I should therefore propose to your Lordships, that in this first appeal the case should be remitted to the Court of Session to inquire, in such manner as to them may seem meet, whether the cruives and yairs complained of are situate on the water of Solway, and protected by the proviso in this statute; and that, with this direction, the Court should review the interlocutor complained of in this appeal, and proceed upon that review as to them may seem just and meet. That, my Lords, will dispose of the first appeal.

My Lords,—The second appeal arises out of a second action, which had been instituted in the year 1817, complaining not of the cruives and yairs, for it seems that in the mean time other machines, the nature of which is perhaps known to your Lordships, called stake-nets, which are extremely destructive to the salmon, by enabling the parties having them to catch more salmon than they could according to the old mode of fishing, had been put down. The first summons, as I stated to your Lordships, complained expressly of cruives and yairs that the defenders had thought proper to erect, and cruives and yairs for the purpose of catching salmon in the lower part of the river Dee, where the sea ebbs and flows. The second summons complained, that they had, 'within the last five years,' before 1817, 'erected a number of stake-nets, and other fixed machinery, for the purpose of catching salmon, not formerly used in the river, upon the sands adjoining to the river Dee, and in the river itself, opposite to their respective lands, within the stewardry of Kirkcudbright, and thereby taken great quantities of salmon contrary to law, and to the great hurt and prejudice of the pursuer the said Alexander Murray, and the other proprietors of salmon-fisheries in the high parts of the said river Dee, and also very much to the prejudice and injury of the navigation of said river.' My Lords, to this they pleaded, that this point was already determined by the decision in the first action I have stated to your Lordships. The defences to the present action are, 1st, That the 'defenders' right of fishing, not only by cruives and yairs, but also by stake-nets, was fully under consideration of the Court in the former process of declarator at the instance of the pursuer in 1804, the result of which was a final judgment that the defenders

'had such right. It is therefore a *res judicata*, and this defence was June 9. 1824.  
'sustained by the Court in the recent decisions in the foresaid pro-  
'cesses' of suspension and interdict.' My Lords, in this case the  
Lord Ordinary and the Court of Session have sustained the plea of  
*res judicata*. Now, my Lords, stake-nets may be the same (I speak  
in utter ignorance), they may be the same as cruives and yairs, but I  
find in the Dumbarton case, which occurred in the year 1813 in the  
Court of Session, that a person who it appeared had an immemorial  
right to a cruive had put down a stake-net; and though that case is  
said to have turned on another point, namely, that the man had a  
right only to the herring-fishery, yet, on reading the judgment of the  
Court of Session, I find that several of the learned Judges proceed on  
the distinction between a cruive and a stake-net, and that if a man  
had a right to a cruive for the salmon-fishery, it does not follow that  
he had a right to a stake-net, and might substitute a stake-net to the  
prejudice of a person higher up the river. I cannot, therefore, concur  
in the finding of the Lords of Session, that this point had been ad-  
judged in the first action. For the sake of the argument, supposing  
your Lordships should not take the course in the first appeal which I  
have proposed to your Lordships, of sending back this interlocutor to  
the Court of Session, because a man had a right to put up cruives in  
the river, would it necessarily follow that he had a right to substitute  
a stake-net to the prejudice of a person higher up the river? It ap-  
pears to me that is a question very well deserving very grave consi-  
deration—more grave than it appears to have received. I feel it to  
be my duty, therefore, to propose to your Lordships to reverse the  
interlocutor sustaining the preliminary defence, and that that action  
should be remitted to the Court of Scotland to proceed further therein.

I cannot but take this opportunity of stating, that if these parties  
are to proceed in litigation, it appears to me they will do it most con-  
veniently to themselves, and with a view to all the questions in the  
cause, in the second action; for they will in that not only try the ques-  
tion of the cruives, but the right of putting down stake-nets, and they  
will have the opportunity of inquiring whether those are on the water  
of Solway or are not. However, that is a matter for their considera-  
tion; whether, when these cases go back, they shall be joined, or what  
course they shall take on that subject, it is not for me to anticipate.  
But in this second action I can have no hesitation in stating, that the  
interlocutor sustaining the defence must be reversed. The preliminary  
defence being set aside, the case will then be open to further consi-  
deration.

*Appellants' Authorities.*—1424, c. 2.; 1427, c. 116.; 1457, c. 86.; 1478, c. 73.; 1488,  
c. 12.; 1563, c. 68.; 1420, c. 20. or 131.; *Magistrates of Dumbarton*, January 16.  
1813, (F. C.); *Diron*, February 25. 1797, (14,282.)

J. CHALMER—

—Solicitors.

(*Ap. Ca. No. 53.*)

No. 41. HUGH ROBERT DUFF, Esq. Appellant.—*A. Connel—J. Tail.*

JAMES GRANT, Esq. Respondent.—*Mackenzie—R. Grant.*

June 9. 1824.

2D DIVISION.  
Lord Pitmilly.

THIS was a question, whether a small piece of ground, called the Kilnhead or Kilnlead, belonged to the appellant or the respondent, the decision of which depended upon the terms of their titles, Duff having brought an action for having it found that it belonged to him, the Lord Ordinary assailed Grant, and to this judgment the Court adhered on the 21st June 1822.\* Duff then entered an appeal; but the House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed, with L. 150 costs.'

J. CHALMER—SCOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 54.*)

No. 42. DAVID GORDON, Appellant.—*Solicitor-General Wetherell—Shadwell.*

WILLIAM HUGHES, and WILLIAM M'MURDO DUNBAR, Respondents.—*Hart—Pemberton.*

*Appropriation—Repetition.*—A debtor having ordered a Company to hold funds, to be remitted to them for behoof of his creditor, and the Company having agreed to do so by a letter to the creditor; and money having been remitted to them, but they having thereafter per incuriam paid it to the debtor; and after consulting a law adviser, having paid it a second time to the creditor;—Held, (reversing the judgment of the Court of Session), That the Company was not entitled to repetition from the creditor.

June 11. 1824.

2D DIVISION.  
Late Lord  
Newton, and  
Lord  
Bannatyne.

MAXWELL HYSLOP resided, for some time prior to 1805, with his brother-in-law, David Gordon, the appellant, who was settled as a merchant in the city of New York, and became indebted to him for advances, on his individual account, to the extent of about L. 500. Having formed a partnership with his brother, Wellwood Hyslop, who was a merchant in Jamaica, to which place Maxwell intended to proceed; and having right to certain funds, forming his share of the succession of his father, who had died in Scotland, he proposed, before his departure from

\* See I. Shaw and Ballantine, No. 565.

New York, to give the appellant right to these funds in liquidation of his claims against him. With this view he executed a power of attorney in favour of Sir Alexander Gordon, the father of the appellant, residing in Dumfries-shire, and Mr Samuel Clark, of Dumfries, authorizing them to uplift the amount, and remit it to Messrs Rathbone, Hughes and Duncan, merchants in Liverpool. Thereafter, on the 30th of December 1805, Maxwell Hyslop addressed this letter to that Company:—'New York, 30th December 1805. Having a few days since apprised you that I had ordered my attorney in Scotland to place in your hands whatever money he may receive on my account from the estate of my deceased father, I have now to request, that you will honour the bills of my brother-in-law, Mr David Gordon of this place, to the amount that may be at my credit with you from the above source.' This letter he delivered to the appellant, and at the same time gave him a letter addressed to himself, in which he acknowledged the amount of the debt, and stated, that 'I have given a letter to Messrs Rathbone, Hughes and Duncan, of Liverpool, authorizing them to honour your bills to the amount of whatever property they may receive from Scotland on my account, by way of collateral security, or a convenience to you.' The appellant, on the 28th of January 1806, transmitted the letter of Maxwell Hyslop to Rathbone, Hughes and Duncan, with one from himself in these terms:—'Enclosed I hand you a letter from my wife's brother, requesting you to hold any money that may be paid into your hands by his attorney to my order. The expected funds are to arise from his share of his deceased father's property, and which, with my wife's and his share, are both directed to be paid into your hands. It is uncertain when these funds may be divided, but we hope in the course of this year; and we have to request you will give us the earliest notice of their receipt.' In answer, that Company wrote to the appellant on the 21st of March 1806, that 'We have been favoured with your letter of 28th January, covering one from Maxwell Hyslop, instructing us to account with you for such monies as we may receive from his attorney in Scotland on his account. Also informing us, that you had ordered Mrs Gordon's proportion of her father's property to be lodged with us. We shall conform to the directions of our young friend, and give you the earliest intimation of the receipt of the money.' In the meanwhile they had corresponded with Mr Clark, who informed them that Maxwell Hyslop's share would perhaps amount to about L.1000.

June 11. 1806.

June 11. 1824.

Maxwell and his brother having entered into partnership, under the firm of Maxwell Hyslop and Company, the appellant carried the debt to the debit of Maxwell Hyslop and Company, with whom he carried on commercial transactions to a considerable extent. Thereafter, Maxwell Hyslop, in April 1808, drew a bill upon Rathbone, Hughes and Duncan, for L. 400, payable to Bogles and Company at sixty days; and at the same time addressed to them this letter:—‘ In consequence of the full expectation that L. 500, or thereabout, will be placed in your hands on my account early next month, added to the probability of the present rate of exchange falling, I have been induced to draw on you under this date, at sixty days’ sight, in favour of Messrs Bogle and Company for L. 400 sterling, which bill I hope will be regularly honoured. I have this day written to my friend Mr Samuel Clark of Dumfries to the above effect, and I have no doubt, from the tenor of his last letter to me, that the needful will be forwarded in good season by him.’ At the time when the bill arrived, funds had not been remitted to Rathbone, Hughes and Duncan; and on receiving his letter they wrote to Clark, that unless this was done immediately, they would be obliged to refuse acceptance of the bill. Clark then remitted funds, and, in consequence thereof, Rathbone, Hughes and Duncan accepted and paid the bill. On learning that this had been done, the appellant, who had returned to Britain, laid a statement of his case before a solicitor in Liverpool, who gave an opinion, that Rathbone, Hughes and Duncan, were bound to account to him for any funds remitted to them on behalf of Maxwell Hyslop, in so far as that person was indebted to him. On shewing this opinion to that Company, they consulted their own solicitor, and he having concurred in the opinion of the other solicitor, they paid the L. 400 to the appellant, after receiving his affidavit as to the amount of the debt. They then wrote this letter to Hyslop:—‘ For some time back David Gordon has been applying to us to pay him the L. 400 received from Samuel Clark, which we refused to do, informing him that we had already paid your draft on us to that amount. Not being satisfied with our answer, however, he came to Liverpool, and took the opinion of an attorney as to the liability of our house to pay the money remitted to us by your late father’s executors, of which opinion he delivered us a copy, which was decisively against us. We then laid the whole circumstances of the case before our own attorney, who thought that your letter to us of 30th December 1805, trans-

'mitted by David Gordon, and our acceptance of your instructions contained therein, by our letter to him dated 21st March 1806, together with the credit which we thereupon gave him, was conclusive on us to account to him for the L. 400 received, and amounted in substance to an acceptance in his favour to that extent on your behalf; and that your letter of 20th April 1808, advising of your having drawn on us, written apparently from forgetfulness of your former directions, and previous engagements consequent thereon, would not annul the engagements we had entered into. After maturely reflecting on these considerations, we thought it advisable to pay David Gordon the sum of L. 400, and accordingly paid him the same with interest, rather than incur the expense of a law-suit, which we saw was inevitable had we persisted in our refusal, and in which there was no prospect of a favourable issue. With respect to the payment of your bill, we can only repeat, that it was paid by one of the partners of our house during the absence of another, who had the business more immediately under his care, without recollecting the engagement we had before entered into on your behalf, and at your request, with David Gordon. We therefore trust you will see the propriety of accounting with us for the amount of the bill so paid under mistake, and the interest as at foot, which we request you to pay to our friends Messrs Hibberts, Taylor and Markland, of your place, who we have authorized to give you an acquittance.' D. Gordon's affidavit as to the facts is in their hands; but we are persuaded that it will not be necessary for them to commence any proceedings at law relative to this business.'

June 11. 1884.

Hyslop having refused to repay the money, the respondents, as representing Rathbone, Hughes and Company, brought an action both against him and the appellant, concluding that one or other of them should be ordained to repay to them the L. 400.

In defence the appellant maintained, that as Hyslop was indebted to him, and the respondents had become bound to hold the funds which they might receive as appropriated to the payment of that debt, they had no right of relief against him. In the meanwhile, an action of accounting had been raised by Gordon against Maxwell Hyslop and Company, and after various proceedings, a remit was made to an accountant. On the question of repetition, Lord Newton at first appointed the respondents 'to confess or deny, whether or not, before making payment to the defender Gordon of the sum mentioned in the libel,

June 11. 1894. 'it was in any shape notified to them that they ought not to do  
'so, as his claim against Hyslop was otherwise paid.' This  
having been answered in the negative, his Lordship found,  
'that the pursuers may be entitled to repetition of the sums pur-  
'sued for against one or other of the defenders; but in respect  
'they undertook to pay that money to the defender Gordon, for  
'repayment of sums due by Hyslop to him, they were not en-  
'titled to pay it to Hyslop till accounts are settled between him  
'and Gordon;' and therefore sisted procedure till the report of  
the accountant should be lodged in the action between these  
parties. The respondents and Hyslop having represented, his  
Lordship, 'in respect Maxwell Hyslop had by a letter to the  
'representers, transmitted to them by David Gordon, instructed  
'them to pay such money as should be remitted to them out of  
'the proceeds of his father's succession, to the said David Gor-  
'don, they were not at liberty to pay the said sum to Hyslop  
'without Gordon's consent; and in respect that Hyslop had  
'countermanded the order to pay the money to Gordon, they  
'were not entitled to pay the money to him, unless he should  
'shew evidence that Hyslop was indebted to him to that amount;  
'and as, notwithstanding thereof, they paid the money both to  
'Hyslop and Gordon, adhered to the former interlocutor, which  
'finds in substance, that they are not entitled to a decret either  
'against Hyslop or Gordon, till it shall be ascertained how  
'accounts stand between them; and refused the desire of the  
'representation.' Thereafter, judgment having been pronounced  
in the process of count and reckoning, finding a balance due to the  
appellant of upwards of 20,000 dollars; and the action of repeti-  
tion having come before Lord Bannatyne, and been reported to  
the Court, Hyslop then maintained, that no liability could attach  
to him, because the appellant had discharged his liability by  
carrying his individual debt to the debt of Maxwell Hyslop and  
Company, and had thereby adopted that Company as his debtor;  
and that, besides, the remittance had been made in order to meet  
the bill with the knowledge of the appellant's father, who acted  
not only as attorney for Hyslop, but also in that capacity for the  
appellant.

To this it was answered by the appellant, that there never was  
any intention to discharge the individual liability of Hyslop;  
that besides, final interlocutors had been pronounced, fixing the  
principle, that if a debt were found to be due by Hyslop and  
Company to the appellant, the respondents could have no claim

against him; and that the appellant's father never had discharged, nor could he discharge, the claim against the respondents. June 11. 1884.

The Court sustained the defences for Maxwell Hyslop, and absolved him; but repelled the defences urged by the appellant, and decreed against him in terms of the libel, 'reserving to the said David Gordon all claims of relief competent to him against the other defender Maxwell Hyslop, and to the said Maxwell Hyslop his defences, as accords.' And to this judgment their Lordships adhered on the 20th of February 1883.\*

The appellant then entered an appeal, (in which no appearance was made by Hyslop), and maintained,—

1. That the order by Maxwell Hyslop to Rathbone, Hughes, and Duncan, and their acceptances of that order, was completely binding upon both of these parties, and could not be rescinded by either of them; and especially could not be rescinded while a balance was due either from Maxwell Hyslop, or from him and his partner Wellwood Hyslop, to the appellant; so that upon the money in question coming into the hands of the respondents, an action at law at the suit of the appellant would have lain against them, to which no legal defence could have been made. The only remedy which the respondents could have had against the appellant, if the parties had been in England, would have been by bill in equity against the appellant and Mr Maxwell Hyslop, shewing that the appellant had no claim upon Maxwell Hyslop previous to the receipt of this money, and that he had been fully paid and satisfied; and therefore that he was liable to refund it. But the action in the Court of Session was a proceeding precisely of this nature; and it was therefore incumbent on the respondents to prove clearly that the appellant had been paid, which had not been done.

2. That by the final interlocutors of the Lord Ordinary, which were acquiesced in by all parties, it was established that the respondents were not entitled to recover back the money which they had paid to the appellant, unless, from the state of the accounts which were under discussion in the other action, it should be found that the appellant was thereby overpaid in respect of his demand upon Mr Hyslop, whereas the reverse had been found.

3. That it is a rule of law, that where, in consequence of a demand founded on an alleged right, money has been paid by a person who knows the facts upon which the demand is made,

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\* See 1. Shaw and Dunlop, No. 206.



June 11. 1894. the money cannot be recovered back even if the demand were unfounded; and as it appeared from the respondents' letter to Maxwell Hyslop, that they paid the appellant the L. 400, with interest, deliberately and advisedly, and after having laid the whole circumstances of the case before their own attorney, they ought not to be at liberty to recover back from him what they so paid, even if they had not been by law compellable to pay the appellant.

To this it was answered,—

1. That the respondents having, under the circumstances before stated, paid the same sum twice, they are entitled to call it back from one of the parties; and it is clear, upon the facts disclosed in the proceedings, (whatever doubt might originally have been entertained upon the subject), that as this was a fund specially belonging to Mr Maxwell Hyslop, he was entitled to regulate the disposal of it as he saw fit; and the appellant was the party who improperly received that money. And,

2. That the appellant obtained payment of the sum in question upon a misrepresentation of a most important fact, viz. that the debt, to secure which the alleged assignment was made, was still subsisting; whereas, in fact, that account had been satisfied, and the money had been applied in payment of Maxwell Hyslop's draft, with the concurrence of Sir Alexander Gordon, the appellant's attorney.

The House of Lords 'ordered and adjudged, that the interlocutors, so far as complained of, be reversed.'

*Appellants' Authorities.*—(3.)—*Brisbane v. Dacres*, 5. Taunt.; *Gomery v. Bond*, 3. Maule and Selwyn, 378.

A. GORDON—ADLINGTON, GREGORY and FAULKNER,—Solicitors.

(*Ap. Ca. No. 56.*)

No. 43. ANDREW THOMSON, Esq. and Others, Appellants.  
*Campbell—Miller.*

ROBERT FORRESTER, Esq. for the Bank of Scotland,  
Respondent.—*Cockburn—Walker.*

*Cautioner—Bank Agent.*—Cautioners having granted bond to the Bank of Scotland to the extent of L. 10,000, for the due performance of the duties of joint agents by two

persons, one of whom became a partner of a mercantile Company, which was known to the Bank; and the joint agents having granted large accommodations to that Company, and to that agent individually; and these accommodations having become known to the Bank, who remonstrated against them as extra-official and extravagant, but who did not give any notice thereof to the cautioners, nor dismiss the agents; and having thereafter taken a promissory-note from one of the agents, for the amount of bills which were past due and exigible from both agents, payable three months thereafter, and got an heritable bond in security thereof;—Held, (reversing the judgment of the Court of Session), That the cautioners were not bound to implement their bond of caution.

IN 1791, William Marshall was appointed agent at Perth for the Bank of Scotland; and the appellant, Andrew Thomson, together with Oliver Thomson and James Wingate, granted a bond of caution for the due performance of the office. Before entering upon its duties, the following instructions of the directors were communicated to William Marshall, by the secretary of the Bank.

June 11. 1824.

2D DIVISION.  
Lord Pitmilley.

'Sir,—I have to communicate to you, by order of the directors of the Bank of Scotland, the following instructions for your government in carrying on the business of the Bank at Perth.

'1. To make that branch advantageous to the Bank, it will be necessary to pay great attention to the circulation of its notes, so that they may be kept out in the circle. Unless this end be attained, the loans at Perth must be a loss to the Bank, as they will be attended with the expense of the office there.

'2. It is found from experience, that the best method of circulating the bank-notes with advantage to the public and to the Bank, is by discounting bills, and that the best discounts for the Bank are bills at short dates, and for small sums; that the agent's safety is greater with these than with bills at longer dates, and for larger sums; that, nevertheless, when the notes are to go into good circulation, and when the agent's security is sufficient, the extent of sums and of the time to run may be the less regarded: that a new discount should never be granted until the old one is paid, let the security be ever so undoubted; for the payment of the old brings in the notes of other Banks, and the new discount circulates those of this Bank.'

The third clause gives instructions as to the best mode of otherwise circulating the notes of the Bank, and need not be quoted. The fourth clause proceeds thus:—

'4. The balances at the Bank's offices are taken weekly, on Monday, and a state of the week's transactions is sent me by the first post thereafter. You will do the same. In your states, class the different operations under the proper heads, agreeable

June 11. 1824. ' to the specimen herewith sent you; and in the balance mention  
' what it consists of, distinguishing the sum into the Bank of  
' Scotland notes, mixed notes, gold, and silver, which balance  
' must be counted and certified upon the state by the Bank's ac-  
' countant also; and as you will balance your cash every night,  
' send me the like note of the contents of your balance at the  
' bottom of your letters which you write me about the middle of  
' the week. At the end of your weekly states, give a list of  
' any bills you may have past due, and to the sum of these add  
' the amount of the current bills.'

The remaining heads relate to the mode of remitting money,—the rate of buying bills on London and other places,—the mode of drawing,—of remittance,—management of cash-accounts,—and a variety of other particulars, of which the following only relate to the present question:—

' 11. Besides the attention above-mentioned to be given to the  
' choice of bills, and the circulation of the bank-notes by their  
' means, you will further observe, that the Bank's agents are not  
' allowed, without shewing sufficient cause to the directors, or  
' without having their consent, to be drawer, acceptor, or indor-  
' ser of the bills to be bought or discounted by themselves. That  
' no bill should be discounted to any person who has allowed his  
' bill to remain unpaid for fourteen days after it was due, unless  
' for some good cause assigned. It is the opinion of the direc-  
' tors, under the like exception, that no bill should be one month  
' past due without diligence upon it by horning charged upon.  
' For raising such diligence, Alexander Keith, Esq. writer to the  
' signet, the Bank's agent here, is recommended to you.'

Under this appointment William Marshall acted as sole agent till 1808, when, at his request, his son John Marshall was made joint agent along with him, under the firm of William and John Marshall. They were thereupon required to find new and additional caution, the former cautioner, Oliver Thomson, being dead, and Wingate being desirous to be discharged of his obligation in future. The appellant, Andrew Thomson, Oliver Gourlay of Craigrothie, (who was now bankrupt, and on whose estate Thomson was trustee), and James Wylie, of Airliewright, agreed to become bound as cautioners, to the extent of £10,000. A bond was accordingly executed by all the parties in September 1808, which, after narrating the terms of the previous bond, and the reasons for requiring this new one, proceeded in these terms:—' Therefore, without prejudice to the bond before nar-  
' rated, but in corroboration and security thereof, et accumulando

'jura juriſus, we, the ſaid William Marshall and John Marshall, Jany 14, 1806.  
 'as individuals; we, the ſaid William and John Marshall, as in  
 'copartnery, as joint agents foreſaid; and we, the ſaid Andrew  
 'Thompson, Oliver Gourlay, and James Wylle, bind and oblige  
 'us all, conjunctly and ſeverally, and our reſpective heirs, exe-  
 'cutors, and ſucceſſors whatſoever, that during the time of us,  
 'the ſaid William and John Marshall, and the ſurvivor of us, con-  
 'tinuing in the ſaid office and truſt of agents for the ſaid Bank  
 'of Scotland, we and the ſurvivor of us ſhall honeſtly, faithfully,  
 'and diligently diſcharge the duties thereof, and do and execute  
 'every thing relative thereto to the beſt of our judgment, for the  
 'benefit of the ſaid Governor and Company, and ſhall fully and  
 'truly account to the ſaid Governor and Company, or to Robert  
 'Forreſter, their treaſurer, or to his ſucceſſors in office, for be-  
 'hoof of the ſaid Governor and Company, for all ſums of money,  
 'whether in ſpecie or in bank-notes, bills, promiſſory-notes, or  
 'otherwiſe, with which we, the ſaid William and John Marshall,  
 'or either of us, or the ſurvivor of us, ſhall be intruſted by them  
 'from time to time, or which ſhall come into our hands or under  
 'our charge in the management of the ſaid office and truſt, or  
 'into the hands or under the charge of the accountant, caſhier,  
 'clerks, ſervants, or others employed under us or the ſurvivor  
 'of us; and that we and the ſurvivor of us ſhall pay in and  
 'deliver to the ſaid Governor and Company, or to their trea-  
 'ſurer for the time, all ſums of money, bills, and promiſſory-  
 'notes, and all writings, documents, or other effects belonging  
 'to them, when required ſo to do; and whatever damage, loſs,  
 'or expenſe, the ſaid Governor and Company ſhall ſuſtain  
 'by us or either of us, or the ſurvivor of us, or by the account-  
 'ant, caſhier, clerks, or ſervants, or others employed under us,  
 'or by the accidents of fire, robbery, theft, or embezzlement,  
 'or any other accident or miſfortune happening to what is  
 'under our charge, or under the charge of thoſe employed by  
 'us or under us, during the continuance of us or the ſurvivor  
 'of us in the ſaid office and truſt; we, the ſaid whole obligants  
 'foreſaid, bind and oblige us and our reſpective foreſaids, all  
 'jointly and ſeverally as ſaid is, to refund and pay the ſame  
 'to the ſaid Governor and Company, or to their treaſurer for  
 'the time, for their behoof, and that immediately on their ſuſ-  
 'taining or incurring the ſaid loſs, damage, and expenſe, with  
 'interſt thereafter during the non-payment, and one-fifth part  
 'more of the ſaid principal ſum of liquidate expenſes in caſe of  
 'failure. But it is hereby declared, that as all remittances and

June 11. 1824. 'carriages of money, notes of the Bank of Scotland, or of any other  
'bank, bills; and other valuable articles, betwixt the office of  
'the said Bank in Edinburgh and their office in Perth, and any  
'other place or places appointed by the directors of the said  
'Bank, are to be made by us, the said William and John Mar-  
'shall, and the survivor of us, conform to the instructions of the  
'said directors, so these carriages and remittances shall be sole-  
'ly at the risk of the said Governor and Company, provided  
'that we, the said William and John Marshall, and the survivor  
'of us, shall strictly observe the instructions thus to be given by  
'the said directors; and if we, or either, or the survivor of us,  
'fail to do so in any particular, we, the said William Marshall  
'and John Marshall, and the survivor of us, and we, the other  
'co-obligants foresaid, and our respective foresaids, shall be  
'jointly and severally liable in the consequences thereof: And  
'further, it is hereby provided and declared, without prejudice  
'to the generality foresaid, that we, the said whole obligants be-  
'fore named, shall not only be accountable for all sums of money  
'with which I, the said William Marshall, have been intrusted,  
'or which have come into my hands during my said agency,  
'but also shall take upon us the whole risk of all bills, promis-  
'sory-notes, and other obligations of every kind which have been  
'discounted or purchased by me, the said William Marshall,  
'and of all other transactions made by me while I have acted as  
'agent for the said Governor and Company, and also of all bills,  
'promissory-notes, and other obligations of every kind to be  
'hereafter discounted or purchased by us the said William and  
'John Marshall, or either of us, or the survivor of us, and of all  
'bills on London or elsewhere, which we, the said William and  
'John Marshall, or either of us, or the survivor of us, shall dis-  
'count or purchase in the execution of the above office and trust  
'committed to us; so that, in case of any loss arising from sums  
'of money either paid or received, or otherwise, or by bad debts,  
'bills, or promissory-notes, which have been discounted or pur-  
'chased by me the said William Marshall, or upon any other  
'obligations whatever to be granted or received by me as agent  
'foresaid, or in case of any loss by bad debts, bills, or promis-  
'sory-notes to be discounted or purchased by us, the said Wil-  
'liam and John Marshall, or either of us, or the survivor of  
'us, or on any other obligation to be granted or received, or  
'transactions to be done by us, or either of us, or the survivor  
'of us, as agents foresaid—all such loss shall fall upon and  
'be sustained by us, the said William Marshall and John

June 11. 1824.

' Marshall, and William and John Marshall, and the sur-  
 ' vivor of us, and on and by us the other co-obligants fore-  
 ' said, and our foresaids only; and in case both of us, the said  
 ' William and John Marshall, or the survivor of us, shall at  
 ' any time be absent from Perth, or shall, by sickness or other-  
 ' wise, be disabled from transacting business, and shall au-  
 ' thorize any person or persons to act for us and for the survivor  
 ' of us, then and in that case we, the said William Marshall and  
 ' John Marshall, and William and John Marshall, and we the  
 ' said other co-obligants, bind and oblige us and our foresaids,  
 ' all jointly and severally as said is, for the whole bills and pro-  
 ' missory-notes which shall be discounted, purchased, or drawn,  
 ' and for all other obligations which shall be granted or received,  
 ' and other transactions whatever that shall be done by the per-  
 ' son or persons so authorized by us, the said William and John  
 ' Marshall, or either of us, or the survivor of us, as fully in all  
 ' respects as if they were done by ourselves or by the survivor of  
 ' us; and as the credits on cash-accounts kept at the office at  
 ' Perth are granted by the court of directors of the said Bank,  
 ' we shall not be answerable for the solvency of the obligants  
 ' therein. But declaring nevertheless, that in case we, the said  
 ' William and John Marshall, or either of us, or the survivor of  
 ' us, shall allow any persons, copartners, societies, corporations, or  
 ' others, holders of the said credits on cash-accounts, to overdraw  
 ' thereon, or to become any way debtors to the said Governor and  
 ' Company beyond the precise sums to which the said credits are  
 ' respectively limited, then and in such case we, the said William  
 ' and John Marshall, and William Marshall and John Marshall,  
 ' and the survivor of us, and we, the said other co-obligants, and  
 ' our foresaids, under the conditions hereafter expressed, shall  
 ' be jointly and severally responsible to the said Governor and  
 ' Company to the amount of the sums so overdrawn, interest  
 ' thereon, and of all the loss, damage and expense which may be  
 ' sustained by the said Governor and Company on that account :  
 ' And in case of the death, bankruptcy, or departure from Scot-  
 ' land of any of the obligants in such cash-accounts, or in case  
 ' any unfavourable alteration should occur in the situation and  
 ' circumstances of such obligants, then we, the said William and  
 ' John Marshall, and the survivor of us, shall be bound, with-  
 ' in one month after such death, bankruptcy, departure, or al-  
 ' teration, to give notice thereof in writing to the said Gover-  
 ' nor and Company; and in case of failure to give such notice  
 ' within the said period, we, the whole obligants foresaid, and

June 11. 1824. ' our foresaids, shall be jointly and severally liable for all loss,  
' damage, and expense, which the said Governor and Company  
' may sustain or incur through such failure. And farther, in  
' regard it is contrary to the instructions to and duty of the said  
' William and John Marshall, as agents for the said Governor  
' and Company of the Bank of Scotland, to act or carry on bu-  
' siness, either jointly or individually, as bankers, on our own or  
' either of our own accounts, or as agent for any other bank,  
' banker, or banking company, it is hereby provided, that if, not-  
' withstanding thereof, it shall be discovered that we, or either,  
' or the survivor of us, shall act or carry on business in any such  
' capacity during our or either of our continuance, or the con-  
' tinuance of the survivor of us, in the said office of agent for  
' the Governor and Company of the Bank of Scotland, we, the  
' whole obligants foresaid, and our respective foresaids, shall be  
' jointly and severally liable for all loss, damage, and expense  
' which the said Governor and Company may sustain and in-  
' cur thereby. And it is hereby further provided and declared,  
' that we, the said Andrew Thomson, Oliver Gourlay, and  
' James Wylie, shall be no further bound and liable, by vir-  
' tue of these presents, than to the extent of L.10,000 Ster-  
' ling, with the interest thereof from the date of the demand  
' which shall be made on us and our foresaids for the pay-  
' ment of the same, and for all expenses which the said Go-  
' vernor and Company shall incur relative thereto; which de-  
' mand and date thereof shall be ascertained by an extract from  
' the letter-book of the said Governor and Company; without  
' prejudice nevertheless to the said Governor and Company, or  
' to their treasurer for the time for their behoof, to have recourse  
' against us, the said William Marshall and John Marshall, and  
' William and John Marshall, and the survivor of us, and our  
' respective heirs, executors, and successors, for the whole loss,  
' damage, and expense which the said Governor and Company  
' shall sustain by us, or either, or the survivor of us, or by the  
' accountant, cashier, clerks, or servants under us, or those ap-  
' pointed to act for us, or by the accidents or misfortunes fore-  
' said, or otherwise any manner of way. And it is hereby fur-  
' ther declared, that we, the said Andrew Thomson, Oliver  
' Gourlay, and James Wylie, and our foresaids, shall in no case,  
' and in no competition which may arise with the said Governor  
' and Company of the Bank of Scotland, or others, be entitled  
' to rank, draw, or compete, to the prejudice of the said Gover-  
' nor and Company, so long as any part of a loss sustained by

June 11. 1824.

‘the said Governor and Company by and through us, the said  
 ‘William and John Marshall, or either, or the survivor of us,  
 ‘or a debt due by us, or either, or the survivor of us, to the said  
 ‘Governor and Company, as their agents or agent foresaid, shall  
 ‘remain unpaid. Provided farther, that in case of the death of  
 ‘any of us, the said Andrew Thomson, Oliver Gourlay, or James  
 ‘Wylie, or that the said Governor and Company shall agree to  
 ‘discharge any one or two of us of the obligation incumbent on  
 ‘us by this present bond, then, and in such cases, it shall be law-  
 ‘ful to and in the power of the said Governor and Company, to  
 ‘accept of other obligants in the place of those who shall have  
 ‘died, or shall have been discharged; and to take bonds or other  
 ‘securities from such new obligants, which shall no ways hurt  
 ‘or prejudice these presents, but shall be in further corrobora-  
 ‘tion hereof; and the whole obligations herein contained shall  
 ‘continue in full force and effect against the surviving and exist-  
 ‘ing co-obligants or co-obligant, in the same manner and as  
 ‘fully in all respects as if all and each of us, the said An-  
 ‘drew Thomson, Oliver Gourlay, and James Wylie, had con-  
 ‘tinued to be bound. Provided farther, that if we, the said  
 ‘Andrew Thomson, Oliver Gourlay, and James Wylie, or any  
 ‘of us or our foresaids, shall at any time hereafter desire to with-  
 ‘draw from the obligations herein stipulated, the person or per-  
 ‘sons entertaining such desire shall intimate the same to the said  
 ‘Governor and Company, at least six calendar months preced-  
 ‘ing the day at which they desire that their responsibility under  
 ‘these presents shall cease, they and their foresaids being always,  
 ‘in virtue hereof, liable for all transactions up to and including  
 ‘that day. And it is further hereby provided, that a stated ac-  
 ‘count between the said Governor and Company, and us, the  
 ‘said William and John Marshall, or the survivor of us, as their  
 ‘agents or agent at Perth, made out from the books of the said  
 ‘Governor and Company, and signed by their accountant, or  
 ‘his assistant for the time, shall be sufficient, and ascertain a  
 ‘balance against us, the said William Marshall and John Mar-  
 ‘shall, and William and John Marshall, or the survivor of us;  
 ‘and against us, the said Andrew Thomson, Oliver Gourlay, and  
 ‘James Wylie, and our respective foresaids, and shall sufficiently  
 ‘warrant legal execution against us, whereof no suspension or  
 ‘other legal sist shall pass, but on consignment only of the sums  
 ‘charged for.’

There then followed a stipulation, that in the event of the death or removal of the agents, the bills and bank-notes, &c. in



June 11. 1894. their hands should not be claimable by them or their representatives, but that the Bank should be at liberty to take immediate possession of them; and there was also a clause for registration and for execution in common form.

John Marshall was at this time a partner in a calico printing company, carrying on business under the firm of Hunter, Burt, Marshall and Company. Mr Burt, one of the partners, was the son-in-law of William, and consequently the brother-in-law of John Marshall; and he was the managing partner in another concern, carried on under the firm of James Inches and Company; and of this company Charles Archer was a partner, and was engaged in another, trading under the firm of Charles Archer and Son.

When these agents commenced to act, the whole accounts and balances of William Marshall had been settled, and were admitted to have been satisfactory and correct. During their administration various instructions were issued by the Bank to them, and in particular a printed paper was transmitted to them in 1809, entitled, 'Bye-laws and Ordinances of the Governor and Company of the Bank of Scotland;' by the 16th article of which it was declared, 'that all past due bills, not paid within six months after the day of payment, shall be absolutely taken up by the agent who discounted the same, and that either by payment in cash, or bills approved of by the directors, and thereafter all procedure on such past due bills shall be in the agent's private name alone, without any mention of the Bank; and for that end, if required by the directors, the treasurer shall give an assignation of the debt and diligence to the agent in his private capacity, and at his private expense; and this shall also be the case in the event of any suspension or other litigation concerning any bill discounted at the agency.' And by article 17th, 'the Bank's inspecting officers shall take particular notice whether the bye-laws and ordinances, now hereby made, are duly complied with, and shall report accordingly.'

Under the original instructions, it was the duty of the agents to transmit to the Bank weekly states of the balances, and to specify at the same time a list of those bills which were past due; and it appeared that in 1808 and 1809 the Bank had made complaints to the agents of this rule not having been observed. From the states, however, which were transmitted early in 1809, it appeared that advances had been made for the accommodation of John Marshall, between the 2d and 30th of January, to the amount of L. 5704, and that he continued to obtain discounts to

the extent of about L.1000 weekly. On the 8th of May 1809 June 11. 1894. Hunter, Burt, Marshall and Company, addressed the following letter to the agents:—‘ We wish to hold a cash-account with ‘ the Bank of Scotland for L.1000; and as, besides our joint ‘ printing trade at Cromwell Park, we are all separately engaged ‘ in business, we hope the directors will be satisfied with our own ‘ security. (Signed) HUNTER, BURT, MARSHALL and Company.’ Subjoined to this letter (which was transmitted to the Bank) was the following note, written by William Marshall, and subscribed under the name of William and John Marshall:—‘ The appli- ‘ cants have just begun business, as calico printers, at Cromwell ‘ Park, near Perth. The Company at present consist of Messrs ‘ Duncan Hunter of London, James Burt, and John Marshall, ‘ manufacturers in Perth. Mr Hunter is said to be a very wealthy ‘ man, worth upwards of L.60,000; Mr Burt, worth upwards of ‘ L.6000 or L.7000; the other is my eldest son, our John Mar- ‘ shall. Their purchase of goods and materials, and their payments ‘ of wages, will be considerable, and give rise to a favourable ‘ circulation of notes, and their returns will be chiefly in London ‘ paper. Perth, 10th May 1809.’ In answer the Bank wrote, that it would be necessary to have two separate securities; and this having been complied with, they granted the cash-account on the 26th of June 1809. By this communication the Bank admitted, that they were made aware that John Marshall, the junior agent, was a partner of this Company; but they stated, that there was no rule of the Bank inconsistent with his being so.

Besides this cash-account, advances were made by the agents to Hunter, Burt, Marshall and Company, by discount, between the 4th of September and 2d October 1809, to the extent of L.6802. Between the 13th of November 1809 and the 12th February 1810, to the amount of L.35,621. Of this the Bank were informed by the weekly states, and by the reports of their itinerant inspectors. They therefore, in the month of February 1810, sent their principal accountant to investigate and report, and he on the 12th of that month reported, that accommoda- tions had been given as follows:—

‘ To Hunter, Burt, Marshall and Company,	L.29,752	0	0
‘ — J. Inches and Company,        -        -	17,306	0	0
‘ — Thomas Chalmers and Company,        -        -	17,062	0	0
‘ — John Marshall,                        -        -        -	8,550	0	0
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	L.72,670	0	0
	<hr/>		

June 11. 1824. In consequence of this report, the Bank, on the 20th of the same month, wrote to the agents, that 'the directors of the Bank of Scotland are of opinion, that the accommodation by discount, given by you as their agents at Perth, to Hunter, Burt, Marshall and Company, James Inches and Company, and Thomas Chalmers and Company, and John Marshall, manufacturer in Perth, is greatly too high, and that the improper extent of it increases the money lent by the Bank of Scotland at Perth much beyond its due proportion, and in a very partial mode of distribution. You are therefore directed to use every prudent exertion for the certain reduction of the accommodation to these parties, and in future to divide the loans in your district more impartially.' In answer, the agents on the 24th stated, that 'we have spoken to Hunter, Burt and Company, and to James Inches and Company, with some of the partners in which concerns we are closely connected, intimating to them, that in future it will not be in our power to discount for them so largely as heretofore; and though it is not reckoned very becoming in this place for a respectable house to do business with more than one bank, yet they are willing to divide theirs, and for that purpose to open an account with another bank, or to withdraw it altogether, as shall be most agreeable to the directors. We have declined discounting to Thomas Chalmers and Company since the receipt of your letter of the 20th, and shall continue to do so for some time to come, until a proportion of their bills are run off; and John Marshall, who is just now in England, will, we have no doubt, be ready to conform to the wishes of the directors. We have only to add, that we supposed Hunter, Burt and Company's business would particularly suit the Bank, as almost the whole bills discounted for them are on London; and farther, that although the Bank's advance here has been considerable, yet no person in the district will accuse us of the smallest partiality in the distribution.' To this the Bank, on the 28th, replied, that 'the directors still consider the accommodation at Perth to be disproportionate. They observe, that twenty parties only have accommodation to the extent of above L. 130,000, and of this the four parties above mentioned have above L. 72,000, being considerably more than the half. Considering the extent, population, and enterprise of your district, it is not easy to consider this distribution impartial.

'From the circumstance of John Marshall being one of the Bank's agents, and of your and his close connexion with

‘Hunter, Burt, Marshall and Company, and James Inches and Company, it becomes in a particular manner your duty, as the Bank’s agents, to guard against the appearance of making those funds which the Bank destines for the equal and impartial accommodation of a large district, subservient almost exclusively to your own extra-official speculations, and those of your intimate and close connexions. June 11. 1824.

‘Accordingly the directors have learned, and without surprise, on viewing the distribution of discounts at the Bank’s office, that a new Banking Company is to be established at Perth, supported chiefly by the agricultural interest of the county. In this event it must be expected that a very considerable part of the money lodged at the Bank’s office will be withdrawn, as a great part of it belongs to the farmers of the district; that the Bank’s circulation will be contracted, an additional channel for the return of its notes opened, and its general business injured.

‘Of these injuries the directors, judging from the mode of distribution of your discounts, cannot altogether acquit you. You mention that it is not considered becoming in Perth for a respectable house, such as Hunter, Burt, Marshall and Company, to do business with more than one bank. The directors hold it to have been your paramount duty, as their agents, to have considered, not what would have been becoming for Hunter, Burt, Marshall and Company, but what would have been at once most safe and beneficial to the Bank, and most equitable and impartial to the country. The directors do not themselves see, nor do they think you could have seen in this light, the disproportionate accommodation which is the subject of this letter.

‘With regard to Hunter, Burt, Marshall and Company, James Inches and Company, and John Marshall, the accommodation to them must certainly be reduced considerably, although the precise extent and mode of the reduction must no doubt be left much to your judgment, and your conception of your duty as the Bank’s agents. You mentioned having declined discounting to Thomas Chalmers and Company since receipt of my letter of the 20th, and that you will continue to do so until a proportion of their bills are run off. The directors trust that you will act prudently in this respect, as you seem to distinguish between this company and the other parties. The directors do not desire any sudden or dangerous check. The reduction should be certain, but may be gradual.’

June 11. 1824.

A great deal of correspondence subsequently took place between the Bank and the agents in regard to this matter ; but no notice was given to the cautioners, nor were the agents removed from their office. On the 15th of October the total discounts by the agency amounted to L.176,000; and in consequence of a requisition from the Bank, the agents transmitted a state of the existing discounts granted to the parties who were connected with John Marshall and to himself. From this specification it appeared that at this time they stood thus:—

‘ Hunter, Burt, Marshall and Company,	L. 20,914	6	3
‘ John Marshall,	5017	7	1
‘ Charles Archer and Son,	4773	3	6
‘ J. Inches and Company,	9311	0	1
‘ John Barland,	2154	18	2
	<hr/>		
	L. 42,170	15	1

In consequence of this the Bank wrote to the agents, on the 13th of November, that ‘ the directors consider these accommodations, particularly those to Messrs Hunter, Burt, Marshall and Company, James Inches and Company, and John Marshall, to be still high and disproportionate to the extent of the district. They recommend gradual reduction thereof rateably and proportionally, with the restriction directed on the 23rd September last; although this restriction should certainly be effected with as much prudence and caution as possible, yet, on the other hand, it must not be forgotten, that it is a part of a general measure, considered necessary at present, and that each office must contribute its proportion in order to effect the whole restriction with as little delay as possible.’ Notwithstanding these orders, however, it appeared from a report of the principal accountant of the 5th of December, that the accommodation granted to

‘ Hunter, Burt, Marshall and Company, was	L. 24,660	0	0
‘ John Marshall,	12,450	0	0
‘ J. Inches and Company,	15,000	0	0
‘ Charles Archer and Son,	9030	0	0
‘ John Barland,	2507	0	0
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	L. 63,647	0	0

The Bank, in consequence of this report, wrote to the agents censuring their conduct, and stated, that ‘ as the directors, in

‘arranging the securities for your official transactions as the Bank’s agent, could not foresee this disproportionate accommodation, and disregard to their instructions for reduction thereof, they feel it their duty to require you to state what additional joint security the obligants in question, and you as the guarantee of their bills, can give for the amount thereof.

‘The directors desire the attendance of one of your number at their ordinary court at Edinburgh, on Monday first, the 17th December current, bringing with him the whole of the bills in and for which the above parties are obligants, and states thereof, classed so as to shew each man’s engagements; and they expect that a proposal of security will then be exhibited to them.’ The agents immediately answered, that they would make a considerable reduction, and offered to indorse, as a collateral security, a bill by Hunter, Burt, Marshall and Company, on Hunter, Rennie and Company, for £. 10,000, at twelve months, which the Bank agreed to receive, but without prejudice to the previous securities. In the month of January 1811, Hunter, Burt, Marshall and Company, became insolvent; and this having been intimated to the Bank, they sent their accountant to Perth to ascertain the existing state of the discounts. This officer reported that they were,—

‘To Hunter, Burt, Marshall and Company,	L. 36,171	12	0
‘— John Marshall,	3,676	2	0
‘— J. Inches and Company,	13,820	2	0
‘— Charles Archer and Son,	9,050	5	6
	<hr/>		
	L. 62,718	1	6

A proposal was then made by the agents, that the Bank should receive instalment bills for 8s. per pound from Hunter, Burt, Marshall and Company, and Hunter, Rennie and Company, and should hold the original bills, in order to proceed thereupon against third parties. After requiring, on the 5th March, a specification of these bills, and receiving it, the Bank, on the 30th of April, wrote to the agents, that ‘in respect of your inability to retire these bills by payment in cash, and of your proposal of 28th February last, that the Bank, without prejudice to any security held by it, should draw from third parties other than Hunter, Burt, Marshall and Company, and Hunter, Rennie and Company, of London, who were to give instalment bills in security, as there proposed, and that the Bank should retain the original grounds of debt, or take new bills, the directors,

June 11. 1804. ' without departure in any respect from your guarantee or other  
' security held by the Bank, order the bills above specified, and  
' procedure thereon, to be transmitted from this office to Messrs  
' Thomas Coutts and Company, the Bank's correspondents in  
' London, with instructions to do the needful against third par-  
' ties foresaid; and they intimate to you, that unless the terms  
' proposed in your said letter of 28th February, as acceded to by  
' my letter of 5th March last, are fulfilled within 14 days hence,  
' they will not hold themselves bound to delay taking steps against  
' all the obligants, and for the different bills above specified.'  
It further appeared, that subsequent to this the agents inquired  
at the Bank, whether they might discount to Hunter, Burt,  
Marshall and Company, with guarantee, to the extent of L.300  
weekly, and it was admitted that the Bank did not object to this  
being done.

In the month of August it was ascertained, that the bills which  
were past due in the hands of the agents, and for which they  
were responsible, amounted to L.39,593. 11s. 11d. William  
Marshall having then been required by the directors to come to  
Edinburgh, a conference took place, the result of which was, that  
on the 31st of August he granted the following promissory-note:—  
' L.39,593. 11s. 11d. Perth, 31st August 1811. In corro-  
' boration and security to the Governor and Company of the  
' Bank of Scotland, of bills discounted or purchased at the  
' office of the said Bank in Perth, by me and John Marshall,  
' my son, as the said Governor and Company's agents there,  
' and now past due, extending of principal at the date thereof,  
' conform to state thereof subscribed by us the said agents, to  
' the sum under specified, for which, by our bond dated the  
' 17th and 29th days of September 1808 years, we are liable to  
' the said Governor and Company; and without prejudice to the  
' said bond, or to any other security held by the said Governor  
' and Company for the said bills, I, William Marshall, of  
' Grange, hereby promise to pay to Robert Forrester, Esq. as  
' treasurer of the Bank of Scotland, and to his successors in  
' office, for behoof of the said Governor and Company, or their  
' order, the sum of L.39,593. 11s. 11d. sterling of principal,  
' against Martinmas next; value as established by the said bond.  
' (Signed) WILLIAM MARSHALL.' At the same time the  
directors obtained from him a bond and disposition in se-  
curity over his landed property, for payment of the above  
sum, and on which infeftment was taken. Still, however, no  
notice of these circumstances and proceedings was given to

the cautioners, and William and John Marshall were allowed to act as agents for eight months thereafter. On the 27th of April 1812, the Bank ascertained that the bills which were then past due amounted to L.47,220, and they therefore resolved to supersede the agents from and after the 11th May. Notice to that effect was immediately given to the cautioners, and that, as the money and other securities belonging to the Bank was to be delivered over to one of the officers of the Bank on the 11th, if the cautioners wished to be present, they might then attend; and that it was highly probable they would be called on for implement of their bond. The agents having been removed, and William Marshall having been again appointed sole agent, under new caution, the Bank caused separate letters to be sent to each of the cautioners, in the following terms, to be subscribed by them respectively:—‘ 30th September 1812.—Sir, ‘ As joint obligant with Oliver Gourlay of Craigrothie, and James ‘ Wylie of Airliewight, Esquires, to the Bank of Scotland, in ‘ a bond for L.10,000, dated 17th and 29th September 1808, as ‘ a collateral guarantee of the transactions of William and John ‘ Marshalls, the Bank’s late agents at Perth, I hereby consent ‘ and agree, so far as I am concerned, that the whole outstanding ‘ debts due to the said Bank, contracted under the agency of the ‘ said William and John Marshall, be wound up, and the dividends received from the different debtors, for behoof of the said ‘ Bank, by William Marshall of Grange, now the Bank’s sole ‘ agent at Perth; and whatever step shall be taken, by or with ‘ the consent of the said William Marshall, in regard to such ‘ debts, shall not infer any departure from the said bond, which ‘ shall remain in full force against me and the other obligants ‘ therein, in the same manner as if I had been previously consulted, and had specially consented to each step or measure ‘ taken in regard to the said debts. I am,’ &c. Each of the cautioners accordingly signed separate letters, in the above terms. On the termination of the sole agency of William Marshall, which took place in 1813, the Bank wrote to each of the cautioners a letter, in which they stated, that ‘ Mr William Marshall is not ‘ now agent of the Bank of Scotland, his official capacity having ‘ terminated on the 27th April 1813. The directors of the Bank ‘ of Scotland do not think it consistent with the statutory carrying on of the Bank, that Mr William Marshall, not being an ‘ officer of the Bank, should now act in the Bank’s name, or ‘ recover debts due to the Bank. And although the directors ‘ will willingly receive any information from Mr William Mar-

June 11. 1894.



June 11. 1824. 'shall, they do not think it consistent with their public duty that, ' in the management of any part of their public trust, they should ' be precluded from acting otherwise than by or with the consent ' of Mr William Marshall.

' They therefore trust that you will see it for the interest of ' all concerned, to transmit to the treasurer of the Bank of Scot- ' land a letter from you in the terms prefixed hereto.'

The letter here alluded to was thus expressed:—' To the ' Treasurer of the Bank of Scotland.—Sir, As joint obligant ' with Oliver Gourlay, Esq. of Craigrothie, and Andrew Thom- ' son, Esq. of Kinloch, in a bond to the Governor and Company ' of the Bank of Scotland, dated the 17th and 29th days of Sep- ' tember 1808, whereby we, conjointly and severally, but under ' the limitation therein mentioned, guarantee to the said Gover- ' nor and Company all bills, promissory-notes, and other obli- ' gations discounted or purchased, and other transactions enter- ' ed into by or through, or during the official charge and trust ' of William Marshall, as agent, or of William and John Mar- ' shall, or either of them, as agents of the said Governor and ' Company at Perth, and by which bond the said Governor and ' Company are declared to be at liberty to dispose of the said ' bills and others at their pleasure, without prejudice to their ' right of recourse on the said bills and others against us, in ' terms of the said bond, I hereby consent that the directors of ' the Bank of Scotland may take such steps as they shall deem ' expedient, for recovery to the said Governor and Company of ' the sums due by the said bills and others, and may compound ' the same, or enter into submissions with any of the obligants ' therein, or may grant to such obligants such delay, or take ' from them such securities as the said directors may judge neces- ' sary and eligible, and that without consulting any of the obli- ' gants in the bond foresaid, and without prejudice thereto in ' any manner of way.'

The cautioners, however, refused to sign this letter, and the Bank having threatened to give a charge of horning on the bond, they presented a bill of suspension, which was passed. In support of it, they maintained generally, *first*, That the bond was of a nature which could not legally be enforced; *secondly*, That the Bank had been guilty of improper conduct in giving any sanction to the accommodations which had been so extensively granted to one of the joint agents, and to companies in which he was interested; and, *thirdly*, That by taking the bill of the 31st August 1811, and thereby postponing the term of pay-

ment of bills which were then exigible, not only from the obligants, but from the agents, till Martinmas, the Bank had given time without the consent of the cautioners, who were thereby liberated from their obligation.

June 11. 1694.

The Lord Ordinary, on advising memorials, issued an interlocutor, stating, that he was 'of opinion that the objections to the legality of the bond, pleaded by the suspenders, are not well founded, and that the existence of the debt is sufficiently instructed in the manner, and by the documents referred to in the bond;' but, at the same time, with a view to the preparation of the cause, ordered the cautioners to lodge a condescendence of their averments. After some intermediate proceedings, his Lordship repelled the reasons of suspension, 'in respect of the terms of the bond in which the suspenders became obligants; and in respect the extent of the discounts and other matters in the management of the Perth agency, which are complained of by the suspenders, were not owing to any fault or omission on the part of the directors, but entirely to the agents themselves, for whom the suspenders are responsible; and in respect it is not established, after all the investigation which has taken place, that the directors of the Bank, after the agency of William and John Marshall at Perth had ceased, took any steps which can injure the suspenders' right of relief, or which could be held to free the suspenders from their obligation, or which were not sanctioned and authorized by the bond granted by the suspenders and the former agents at Perth.' The cautioners then represented, and prayed to be allowed a farther investigation, but his Lordship refused the representation. The cautioners then reclaimed to the Court, and, on advising their petition with answers,—

*Lord Robertson* observed, The objections to the legality of the bond, which seem to rest on the circumstance of its being gratuitous, are unfounded. On the merits it appears to me, that the Bank were entitled and bound to exercise that controul over their agents, which any prudent man will do in regard to his own affairs. The cautioners must therefore allege that the Bank have not done so, or that they violated some clause in the bond. There is, however, no evidence before us to that effect, and, on the contrary, we have evidence that the Bank repeatedly remonstrated with the agents in very strong terms as to their conduct. The very object of the bond was to secure the Bank against the improper conduct of the agents. There is no special mode pointed out in the bond of managing the business, to which the Bank

June 11, 1894. — was bound to adhere. In the case of Nisbet there was an express clause as to the mode of controul, which was neglected to be exercised by the creditor. On this part of the case, therefore, I think the interlocutor right; but I have very considerable doubts as to the effect of sanctioning extensive accommodations to John Marshall, the joint agent. It appears that Marshall was a partner of a company, and that, after the joint agency was constituted, very extensive accommodation was given, both to him and to that company. I do not inquire at present how far it was proper on the part of the Bank to allow such accommodation; but, at all events, they were bound to exercise a very severe controul. In regard to this part of the case, however, I do not think that we have sufficient materials before us, and therefore I should wish to have a farther investigation.

*Lord Craigie.*—This is a case of importance and difficulty. In the first place, I think that it was the duty of the Bank to communicate fully to the cautioners the whole of the correspondence with the agents, and that we ought to have a fuller production of it than has yet been made. On the merits, I do not think that any plea can be drawn in favour of the cautioners from the instructions which were given after the joint employment. They were mere directions to the agents, which the Bank might enforce or not, as they might think fit; but I am not so sure as to those in 1791. These formed a sort of declaration of what were the duties and obligations of the agents; and which the cautioners were entitled to assume would be enforced by the Bank, and, of course, to rely upon them in entering into their obligation. I think, however, that the Bank has conducted itself in the whole of this matter with gross inattention to the interests of the cautioners. Accommodations to the joint agent, and to companies in which he was engaged, were known to be daily given; and yet this system was allowed to be persevered in, without giving any notice to the cautioners, and notwithstanding that the Bank remonstrated with the agents on the footing of its being a violation of their duty. Then, after the insolvency of one of these companies, in which one of the agents was a partner, was made known to the Bank, no notice was given to the cautioners. I rather think that they were called on to give that notice; but on this, and on other parts of the case, I have not sufficiently made up my mind, in consequence of a deficiency of materials, so as to enable me to sustain the objections to the bond, and therefore I would wish farther investigation.

*Lord Justice-Clerk.*—This is certainly a case of importance;

but I have come prepared to decide it. It is no doubt stated in the petition, that the cautioners are entitled to a further production, but there is no such prayer; and the case is argued with a view to get the interlocutor altered on the merits. I consider it one of importance, because it will have a general effect in regulating the conduct of all banks. The bond is so formed as to make all the parties co-obligants; but it is admitted that, as to the suspenders, it is a cautionary obligation. The question, therefore, is, Whether they are in a situation to demand liberation from that obligation. By the bond they are rendered responsible for the faithful execution of the agency, to the extent of L.10,000. If, therefore, the agents are not faithful, the cautioners must be liable; and they are also cautioners to the above extent, for a true accounting at the conclusion. It is somewhat difficult to make out, from the petition of the cautioners, what are the specific grounds on which they rest their case; but I think the general issue has been well stated from the Bar to be, whether they have got fair play. I have endeavoured to reduce the specific objections under three heads; and these are, *first*, That the bond ought to be denied effect, because no value was paid to the cautioners, and because it imposes an obligation of great hazard; *second*, That the Bank, by its misconduct, has lost its claim; and, *third*, That by giving time, the cautioners have been liberated. In regard to the first of these objections, it is plainly not well founded. The obligation is certainly of a hazardous nature, but there is nothing illegal in it. The second objection is rested on the circumstance of the agents having grossly deviated from their duty; but the Bank did every thing in their power to keep the agents to it, by repeatedly remonstrating, and desiring them to be upon their guard. I therefore cannot enter into the idea that the Bank had been guilty of such laches as to liberate the cautioners; and I do not see any such specific allegation on this subject, as entitles us to admit further investigation. If parties choose to enter into a risk of this nature, then the rule of law is, that it is the duty of those who undertake it, to make inquiries as to the conduct of the agents. It is not the duty of the Bank to intimate to the cautioners the various and fluctuating accommodations which may occur in the course of the agency. When the Bank discovered the extent of the accommodation, and particularly to certain favoured companies, they immediately interfered, and ordered the agents to reduce the discounts. If they had caused an immediate stop to take place, the consequence would have been, that both the agents and the companies would

June 11. 1884.

June 11. 1824. have been rendered bankrupt; so that the conduct of the Bank was perfectly prudent. If it had been alleged, that there had been any criminal connivance between the Bank and the agents in regard to these accommodations, I could understand the propriety of having a further investigation; but there is no such allegation. The third and last objection is, That time was given to the agents, without the consent of the cautioners; and no doubt, if this be true, the cautioners will be liberated. But in truth there has been no such giving of time here; for it is not alleged that there was any renewal of the bills which were past due, and the promissory-note, after the termination of the agency, and the Bank had entered into possession, was merely a constitution of the debt against the agents, and the disposition in security a provision for payment, both which the Bank were entitled to take. Therefore I think that the interlocutor is right.

*Lord Glenlee.*—I certainly read the papers under the impression that no further investigation was to take place. In doing so, what I looked chiefly to, was the allegation as to time having been given. But the promissory-note is not of that nature. It was merely a liquidation of the debt, with a view to supersede the necessity of obtaining a decree of constitution. I am therefore disposed to adhere, and, if any thing more specific can be stated, the cautioners may come to us in a reclaiming petition.

*Lord Robertson.*—I was aware that there was no special prayer for farther investigation; but, on looking into the farther proceedings, I now see that there was a prayer to that effect to the Lord Ordinary, which was refused, and that this part of the judgment has been acquiesced in. As we must therefore decide the case as it stands, I am for adhering.

Accordingly, on the 29th of January 1822,\* the Court adhered, and found expenses due.

The cautioners then entered an appeal, and maintained that the judgments ought to be reversed,—

1. Because a bond for the good behaviour of an agent cannot be made effectual in a court of equity, where the conduct of the agent, through which the loss has ensued, has become known to and been recognized by the principal; which had been the case here, and the Bank had not exercised that due care and diligence which they were bound to do on behalf of the cautioners.

2. Because as time was granted by the Bank to parties by or for whom bills had been discounted; and the Bank had also

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\* See 1. Shaw and Ballantine, No. 319.

entered into a new arrangement, giving time to one of the principals for the payment of the debt, without the knowledge or consent of the cautioners, they were discharged from their liability. June 11. 1836.

3. Because they did not receive due notice of any of the transactions from which the loss sued for had arisen.

On the other hand, it was maintained by the Bank that the judgments were well founded,—

1. Because the appellants, after having been allowed an uncommon latitude of investigation, had utterly failed to shew that the directors of the Bank did not exercise due care and diligence in watching over the conduct of the agents for whom the appellants were responsible; and it was quite irrelevant to allege, that notwithstanding such care and diligence on the part of the directors, the proceedings of the agents were in some respects imprudent or improper. That it was precisely because the directors could not so completely controul their agents as to prevent the consequences of their imprudence or dishonesty, that bonds of the nature of that charged on were required.

2. Because, neither during the subsistence of the joint agency, nor after its termination, did the directors sanction any act calculated to weaken any right of relief to which the appellants were justly entitled: And the taking of the note and relative security from William Marshall in August 1811, was an act beneficial to the appellants, as well as to the Bank.

3. Because the bond contained no proviso that the directors should be bound, either to consult the co-obligants respecting the administration of the Bank's affairs, or to intimate to them any proceeding on the part of the agents which may be deemed improper: that the directors never refused to give the appellants any information for which they applied; and when it was resolved to put an end to the joint agency, notice was given to the appellants in the manner which is customary on such occasions. And,

4. Because, by their several letters addressed to the treasurer of the Bank, on the 30th September 1813, after the joint agency had terminated, the appellants declared, that whatever steps should be taken for recovery of the outstanding debts, 'by or with the consent of the said William Marshall,' should be binding upon them. And in the same letter, each of the appellants described himself as being a 'joint obligant' in the bond, and used other expressions, implying that it was still in full force against them.

The House of Lords 'ordered and adjudged, that the interlo-

June 11. 1824. 'cutors complained of be reversed, and that the letters be suspended simpliciter.'

LORD GIFFORD.—My Lords, There is a case to which I will now call your Lordships' attention—the case of Thomson v. Forrester. The interlocutor of the Court of Session arises out of these circumstances:—In the year 1808 a bond was executed by the appellants, and by Mr William Marshall and Mr John Marshall, the effect of which was, that the appellants became bound to the Bank of Scotland in the sum of L.10,000, as cautioners and sureties for William and John Marshall, who were at that time appointed joint agents for the management of that branch of the Bank which is established at Perth. Upon this bond the Bank, in 1815, raised diligence against the cautioners in the Court of Session in Scotland; and certain judicial proceedings having taken place, they obtained a final judgment in January 1822, the effect of which was to declare the bond to be valid, and that the cautioners were liable in the whole amount for which they had become security. It is with a view to review that decision that the question is brought before your Lordships. My Lords, the bond entered into by the appellants, and Mr William Marshall and Mr John Marshall, in the year 1808, contains a great variety of provisions on behalf of those cautioners, and on behalf of the persons for whom they are sureties. It recites a bond of 1791, entered into by Mr William Marshall, as principal, and the appellant, Andrew Thomson, and also Mr Oliver Gourlay and Mr James Wingate, as cautioners and sureties, by which they bound and obliged themselves, conjunctly and severally, and their heirs, executors, and successors, that during the term of Mr Marshall continuing in the office and trust of agent for the Bank of Scotland, he should faithfully discharge the duties thereof as stipulated in the bond; and reciting that Mr Marshall had ever since acted in the capacity of agent; that Mr Oliver Gourlay died on the 16th of November 1806; and that Mr Wingate was desirous that he should not remain bound under the bond for any transaction posterior to the last date thereof; and also reciting that Mr William Marshall was desirous that Mr John Marshall, his son, should be appointed joint agent for the Bank of Scotland, which was agreed to; that in the year 1808, his son being joined with him as joint agent, this new security was entered into, in which the appellants became bound as cautioners and sureties for Mr William Marshall and Mr John Marshall. After reciting the bond of 1791 very shortly, it goes on, 'Therefore, without prejudice to the bond before narrated, but in corroboration and security thereof, we, the said William Marshall and John Marshall, as individuals, we, the said William and John Marshall, as a copartnership or joint agents fore-said, and we, the said Andrew Thomson, Oliver Gourlay, and James Wylie, bind and oblige us all, conjunctly and severally, and our respective heirs, executors, and successors whatsoever, that during the time of us, the said William and John Marshall, and the survivor of

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' us, continuing in the said office and trust of agents for the said Bank of Scotland, we, and the survivor of us, shall honestly, faithfully, and diligently discharge the duties thereof, and do and execute every thing relative thereto to the best of our judgment, for the benefit of the said Governor and Company; and shall fully and truly account to the Governor and Company, or to Robert Forrester, their treasurer, or to his successors in office, for behoof of the Governor and Company, for all sums of money, whether in specie or in bank-notes, bills, promissory-notes, or otherwise, with which we, the said William and John Marshall, or either of us, or the survivor of us, shall be intrusted by them from time to time, or which shall come into our hands, or under our charge, in the management of the office and trust, or into the hands or under the charge of the accountant, cashier, clerks, servants, or others employed under us, or the survivor of us; and that we, and the survivor of us, shall pay in and deliver to the Governor and Company, or to their treasurer for the time, all sums of money, bills, and promissory-notes, and all writings, documents, or other effects belonging to them, when required so to do; and whatever damage, loss, or expense, the Governor and Company shall sustain, or any accident, or so forth, that it shall be made good to the Bank.

Then it was declared, ' that as all the remittances and carriages of money, notes of the Bank of Scotland or any other bank, bills, and other valuable articles, betwixt the office of the Bank in Edinburgh and their office in Perth, and any other place appointed by the directors of the Bank, were to be made by Messrs William and John Marshall, and the survivor of them, conform to the instructions of the directors, so the carriages and remittances should be solely at the risk of the Governor and Company, provided that William and John Marshall, and the survivor of them, shall strictly observe the instructions thus to be given by the directors.' Then it says, ' And if we, or either, or the survivor of us, fail to do in any particular, we, the said William Marshall and John Marshall, and the survivor of us, and we, the other co-obligants foresaid, and our respective foresaids, shall be, jointly and severally, liable in the consequences thereof.' Then it goes on to state, that they shall take upon themselves the whole risk of all bills, promissory-notes, and other obligations of every kind which had been discounted or purchased by William Marshall, and of all other transactions made by him while he acted as agent for the Governor and Company, and also of all bills, promissory-notes, and other obligations of every kind thereafter discounted or purchased by William and John Marshall, or either of them, or the survivor of them, and of all bills on London or elsewhere, which they should discount or purchase in the execution of the office and trust committed to them. Then, my Lords, it goes on in a variety of other provisions, binding those persons to the strict performance of the duty which those two



June 11. 1824. gentlemen of the name of Marshall had then taken upon themselves as agents for this Bank.

My Lords,—It appears that a very short time after this bond had been entered into, Mr Marshall, the son, who was one of the agents for the Bank, entered into partnership with persons of the names of Duncan Hunter and James Burt; and it appears, that on the 9th of May 1809 they addressed a letter, signed Hunter, Burt, Marshall and Company, of which firm John Marshall was one, to William and John Marshall, the agents for the Bank of Scotland, desiring to have a cash-account with the Bank of Scotland for L.1000. For this loan there was an application in the hand-writing of William Marshall, the senior agent, in these terms:—‘The applicants have just commenced business as calico printers, at Cromwell-park, near Perth. The Company at present consist of Messrs Duncan Hunter, of London, James Burt and John Marshall, manufacturers in Perth. Mr Hunter is said to be a very wealthy man, worth upwards of L.60,000; Mr Burt worth upwards of L.6000 or L.7000; the other is our John Marshall. Their purchase of goods and materials, and their payments of wages, will be considerable, and give rise to a favourable circulation of notes; and their returns will be chiefly in London paper.’ This is the note to the Bank of Scotland.

My Lords,—To this letter the directors returned an answer by their secretary, stating, ‘that he had laid before the directors the application for a credit of L.1000; and begged to inform them, that the rules of the Bank required two separate securities besides the holder of the account.’ To this the joint agents replied in these terms:—‘We wrote you yesterday, and we have now to mention, that Hunter, Burt, Marshall and Company, propose as securities for their cash-account of L.1000, Messrs Charles Archer and Robert Hepburn, both merchants here.’ So that your Lordships perceive by the letter I have read, the Bank were apprised that John Marshall, one of the agents, had embarked in this copartnership with Mr Hunter and Mr Burt.

My Lords,—It appears that, after this, discounts to a large amount were transacted between this firm and the agents of the Bank, to the amount of many thousand pounds. I will not detain your Lordships by stating the various advances; but it appears that, in the month of February 1810, the accommodation at that time given to this and three other houses were:—‘To Hunter, Burt, Marshall and Company, L. 29,572,—J. Inches and Company, L. 17,306,—Thomas Chalmers and Company, L. 17,062,—and to John Marshall himself, L. 8550.’ This account having been reported to the Bank, they wrote on the 20th February 1810 to their agents, as follows:—‘The directors of the Bank of Scotland are of opinion, that the accommodation by discount given by you, as their agents at Perth, to Hunter, Burt, Marshall and Company, James Inches and Company, Thomas Chalmers and Company, and John Marshall, manufacturer in Perth, is greatly too high; and that the improper extent of it increases the

‘money lent by the Bank of Scotland at Perth much beyond its due proportion, and in a partial mode of distribution. You are therefore directed to use every prudent exertion for the certain reduction of the accommodation to these parties, and in future to divide the loans in your district more impartially.’ June 11. 1894.

To this an answer was written on 24th February by William Marshall, in name of William and John Marshall, in these terms:—‘We are favoured with your private letters of the 20th and 21st current; and in reply to the first we have spoken to Hunter, Burt and Company, and to James Inches and Company, with some of the partners in which concerns we are closely connected, intimating to them, that in future it will not be in our power to discount for them so largely as heretofore; and though it is not reckoned very becoming in this place for a respectable house to do business with more than one bank, yet they are willing to divide theirs, and for that purpose to open an account with another bank, or to withdraw it altogether, as shall be most agreeable to the directors. We have declined discounting to Thomas Chalmers and Company since the receipt of your letter of the 20th, and shall continue to do so for some time until a proportion of their bills are run off; and John Marshall, who is just now in England, will, we have no doubt, be ready to conform to the wishes of the directors. We have only to add, that we supposed Hunter, Burt and Company’s business would particularly suit the Bank, as almost the whole bills discounted for them are on London; and farther, that although the Bank’s advance here has been considerable, yet no person in this district will accuse us of the smallest partiality in the distribution.’

On the 28th of February the Bank replied thus:—‘I have laid before the directors of the Bank of Scotland your letter of 24th February 1810, relative to the accommodation given at the Bank’s office at Perth to Hunter, Burt, Marshall and Company, James Inches and Company, and John Marshall. The directors still consider the accommodation at Perth to be disproportionate. They observe, that twenty parties only have accommodation to the extent of above L.190,000, and of this the four parties above-mentioned have above L.72,000, being considerably more than the half. Considering the extent, population, and enterprise of your district, it is not easy to consider this distribution impartial. From the circumstance,—I beg your Lordships’ attention to this paragraph which I am about to state to you, because it will shew your Lordships in what way the Bank considered this transaction,—‘From the circumstance of John Marshall being one of the Bank’s agents, and of your and his close connexion with Hunter, Burt, Marshall and Company, it becomes in a particular manner your duty, as the Bank’s agents, to guard against the appearance of making those funds which the Bank destines for the equal and impartial accommodation of a large district, subservient almost exclusively to your own extra-official speculations,

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'and those of your intimate and close connexions.' Now, my Lords, I refer your Lordships to this to shew that the Bank themselves considered that the accommodation which these agents were granting to one of themselves was an extra-official accommodation, and not such as ought to take place on the part of those agents; and that therefore they very properly make this observation, but they do no more except that. In the subsequent correspondence they require that this accommodation may be restricted; but they still go on continuing those persons as their agents from this time till the year 1811; and your Lordships will find, notwithstanding undoubtedly they wrote several times to desire that those discounts should be reduced, they got up again. Your Lordships will find, that on the 6th of November the discounts for these houses were as follows:—Hunter, Burt, Marshall and Company, L.20,914. 6s. 3d.—John Marshall, L.5017. 7s. 1d.; the other houses, Charles Archer and Son, L.4773. 3s. 6d.—James Inches and Company, L.9311. 1d.—John Barland, L.2154. 18s. 2d.

On the 13th of November 1810, however, the directors wrote to the agents: 'The directors of the Bank of Scotland have considered your letter of 6th November current, with state of the following accommodation at the Bank of Scotland's office at Perth, (alluding to the discounts immediately before-mentioned). The directors consider these accommodations, particularly those to Messrs Hunter, Burt, Marshall and Company, and James Inches and Company, and John Marshall, to be still high and disproportionate to the extent of the district. They recommend gradual reduction thereof, rateably and proportionally, with the restriction directed on the 28th September last. Although this restriction should certainly be effected with as much prudence and caution as possible, yet, on the other hand, it must not be forgotten, that it is a part of a general measure considered necessary at present, and that each office must contribute its proportion in order to effect the whole restriction with as little delay as possible.' On the 5th of December 1810 the accommodation granted to Hunter, Burt, Marshall and Company, was L.24,680—John Marshall, L.12,450—James Inches and Company, L.15,000—Charles Archer and Son, L.9080—John Barland, L.2507.

The secretary to the Bank, on the 10th December 1810; wrote to the joint agents as follows:—'The directors of the Bank of Scotland observe, that the engagements of the following parties at the Bank's office at Perth, under your official administration as the Bank's agents, are, at 6th December, as follows,'—giving the state of the accounts. 'The directors censured the extent of accommodation to these parties, and required reduction by my letter of the 20th February last, and again by 28th February, and again by letter 30th November last. Notwithstanding thereof, and of the general order of restriction communicated in my letter of 28th September last, the amount of the engagements of the above parties, which was at 6th November last L.42,170. 15s. has been extended, in one month, to

'the above sum of L.63,647, at 6th December current. As the June 11. 1894.  
'directors, in arranging the securities for your official transactions as  
'the Bank's agents, could not foresee this disproportionate accommoda-  
'tion, and disregard to their instructions for reduction thereof, they  
'feel it their duty to require you to state what additional joint secu-  
'rity the obligants in question, and you as the guarantee of their bills,  
'can give for the amount thereof.' Then they wrote back for answer,  
on the 13th December 1810, that they engaged to make considerable  
reduction before the 1st of February 1811, and offered to indorse to  
the Bank, in collateral security, a bill by Hunter, Burt, Marshall and  
Company, on Hunter, Rennie and Company, for L. 10,000, at twelve  
months from 1st December 1810. The Bank then wrote, on the 18th  
December, regarding this L. 10,000 bill, that they considered it as their  
duty to require this indorsation; but it was not to pledge them to ad-  
mit of any delay in the restriction enjoined and promised, and that  
they expected, till farther notice, a weekly state of the accommodation  
to Hunter, Burt, Marshall and Company, John Marshall, Charles  
Archer and Son, and James Inches and Company, shewing the total  
accommodation to each party at the date of the same, but without  
specifying particular bills, unless specially required. On the 26th  
December the Bank intimated to the agents, that the collateral security  
of this bill was taken without prejudice to the previous securities for  
the official transactions of the agents.

Your Lordships will find, that in the following month of January,  
Messrs Hunter, Burt, Marshall and Company, were intimated to  
the directors to be insolvent; and it appears that at that time the  
discounts which they had received from the Bank, and outstanding  
against them, were thirty-six thousand odd hundred pounds—against  
John Marshall three thousand odd hundred pounds—James Inches  
and Company thirteen thousand eight hundred odd pounds—and  
against Charles Archer and Son L. 9050—making a total of L. 62,718.  
1s. 6d. My Lords, in consequence of this insolvency, in the following  
month of August 1811 the Bank came to an arrangement with  
William Marshall; and upon that occasion the bills which were over  
due amounted to the sum of L. 39,593. 11s. 11d. for which they were  
considered responsible; and upon that occasion he gave a promissory-  
note, dated the 31st of August 1811, for the L. 39,593. 11s. 11d. It  
is in these terms:—'In corroboration and security to the Governor  
'and Company of the Bank of Scotland, of bills discounted or pur-  
'chased at the office of the Bank in Perth, by me and John Marshall,  
'my son, as the said Governor and Company's agents there, and now  
'past due, extending of principal at the date thereof, conform to  
'state thereof subscribed by us, the said agents, to the sum under  
'specified, for which by our bond, dated the 17th and 29th of  
'September 1808, we are liable to the Governors and Company; and  
'without prejudice to the said bond, or to any other security held by  
'the Governor and Company for the said bills, I, William Marshall

June 11. 1824. ' of Grange, hereby promise to pay to Robert Forrester, Esq. as  
 ' treasurer of the Bank of Scotland, and to his successors in office,  
 ' for behoof of the Governor and Company, or their order, the sum of  
 ' L. 39,593. 11s. 11d. Sterling, against Martinmas next.' This note,  
 your Lordships will perceive, is given in August, and is payable at  
 Martinmas next; and he gave a bond and disposition in security over  
 the whole of his estate for this sum of L. 39,593 and a fraction, pay-  
 able also at the following Martinmas. My Lords, it appears, how-  
 ever, that they still continued Mr John Marshall as their agent; and  
 at the time of this arrangement with Mr William Marshall, no arrange-  
 ment took place, which the sureties were informed of, with Mr  
 William Marshall—no notice whatever was given to them, or any  
 communication had with them upon the subject: and although your  
 Lordships find, that at that time the sum due from those persons, for  
 which they were liable under the bond, was so large a sum as L. 39,900;  
 though Hunter and Company, of which firm John Marshall was one,  
 had become insolvent; they continued this gentleman, without any  
 communication with the sureties, until some time in the following  
 year, when I think Mr John Marshall was allowed to retire from the  
 agency, and Mr William Marshall was allowed to continue the sole  
 agent.

My Lords,—In the following year 1812, there was a communication  
 made to the appellants by the Bank on the subject of their demands  
 against these agents, the Bank considering they were liable to the  
 amount of L. 10,000; and the answer from them at that time, while  
 they were ignorant of any of the circumstances of the case, was, that  
 they considered themselves bound under their obligation. Afterwards,  
 however, when they gave their attention to the facts, they resisted any  
 payment under the bond, contending, that the negligence of the Bank  
 in their dealings with those persons, in suffering them to act in the  
 character of agents for their own personal advantage, and that at all  
 events the transaction with William Marshall in the year 1811, by  
 which time had been given him for the payment of this debt without  
 their consent, operated in point of law as a discharge against them as  
 cautioners.

My Lords,—The appellants having been threatened with a charge  
 on the bond at the instance of the Bank in the year 1815, raised a  
 bill of suspension, which was passed upon caution, upon which letters  
 of suspension were afterwards expedited, bearing date the 19th of May  
 1815. The action having come before Lord Pitmilley as Ordinary,  
 appearance was made on behalf of the Bank by their treasurer; and  
 his Lordship having ordered the case to be stated in mutual memorials,  
 without a previous hearing, on the 21st of November 1816 pronounc-  
 ed the following interlocutor, which is the first appealed from here:  
 ' The Lord Ordinary having considered the mutual memorials for the  
 ' parties in this cause, with the whole process, is of opinion that the  
 ' objections to the legality of the bond pleaded by the suspenders are

‘not well founded.’ My Lords, they took an objection, which undoubtedly appears not to be well founded, to the nature of the bond—that it is a security which, from its nature, cannot be enforced. However, the Lord Ordinary was of opinion it was a good security, ‘and that the subsistence of the debt is sufficiently instructed in the manner and by the documents referred to in the bond,’ and ordered a condescendence to be given in. In compliance with this order the condescendence was lodged, on advising which the Lord Ordinary, on the 7th June 1817, allowed the parties to be heard at the Bar upon the whole cause; after hearing which, on the 18th November 1817, he pronounced the following interlocutor:—‘The Lord Ordinary having heard parties’ procurators in terms of the interlocutor of 7th June last, allows the suspenders to put in a minute stating the precise object of the diligence now craved by them at the Bar, and allows the chargers to see and answer the minute; and thereafter, before answer, appoints the suspenders to give in a pointed condescendence, in terms of the Act of Sederunt, of the facts they aver and offer to prove in support of their reasons of suspension.’ A minute was accordingly given in, craving diligence for recovery of certain writings; and on the 6th of June 1818 the Lord Ordinary pronounced the following interlocutor:—‘The Lord Ordinary having considered the minute for the suspenders, answers thereto for the chargers, replies and duplies,’ and so on. I shall not trouble your Lordships at length with this interlocutor; the next is the most material one.

The cause came on to be considered on the 28th. January 1820, when the Lord Ordinary made this interlocutor:—‘Having considered the condescendence for the suspenders, with the answer for the chargers, and having also again considered the memorials for the parties, with the whole process, and particularly the written pleadings and productions made since the memorials were formerly advised; in respect of the terms of the bond in which the suspenders became obligants, and in respect the extent of the discounts and other matters in the management of the Perth agency, which are complained of by the suspenders, were not owing to any fault or omission on the part of the directors, but entirely to the agents themselves, for whom the suspenders are responsible; and in respect it is not established, after all the investigation which has taken place, that the directors of the Bank, after the agency of William and John Marshall at Perth had ceased, took any steps which can injure the suspenders’ right of relief, or which could be held to free the suspenders from their obligation, or which were not sanctioned and authorized by the bond granted by the suspenders and the former agents at Perth; repels the reasons of suspension, finds the letters orderly proceeded, and decerns.’

My Lords,—A short representation was refused by the Lord Ordinary. The whole cause was then submitted to the review of his

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June 11. 1822. Lordship in a representation, and on the 28th of November he pronounced an interlocutor, by which he refused the desire of the representation; and adhered to the interlocutor represented against. The appellants having presented a petition to the Second Division of the Court of Session against this interlocutor, and their petition having been appointed to be answered, their Lordships, upon consideration thereof, on the 29th January 1822, pronounced the following judgment:—‘ Having advised this petition, with answers thereto, adhere to the interlocutor reclaimed against; and refuse the desire of the petition.’ The result, therefore, of the interlocutor is, that the Court of Session consider that these cautioners are still liable upon this bond.

My Lords,—I have considered this case with all the attention I am capable of, frequently since it was discussed at your Lordships’ Bar; and, my Lords, however painful it is to me at any time to differ in opinion with the Court of Session, I must confess that, in discharging my duty to your Lordships, I cannot refrain from stating, that I consider the opinion to which the Court have come in the present instance as incorrect. My Lords, in the first place it appears, that the Bank, after they were fully aware of the conduct of these agents, in not discharging their duty as agents, but making large advances for the private accommodation of a firm in which one of the agents was himself a partner; they themselves stated that they considered that conduct on the part of their agents extra-official. My Lords, it was part of their duty, it was their bounden duty to the cautioners, to have put an end to those proceedings the moment they were aware of them; or at all events, to have advised the cautioners of the proceedings, so that they might judge how far those agents were worthy of the trust reposed in them. Their obligation was, that they would be answerable for the due discharge of the duties of those gentlemen as agents for the Bank; but I say, the moment those agents, or one of them, which is the same thing, departed from that duty, and was making use of the funds of the Bank for his own private accommodation, that was what was not in the contemplation of those parties when this stipulation was made—that they were to be answerable not only for the transactions of these gentlemen as agents to the Bank, but for their private transactions with Hunter and Company. According, however, to the decree of the Court of Session, it comes to that,—that they are to be answerable to that extent, and that they are to be answerable for the discounts which John Marshall, the son, had obtained from the Bank at the time of those transactions. But even supposing that this did not relieve those cautioners from this security, I took the liberty, when this case was argued at the Bar, of putting it to the respondents’ Counsel, whether time had not been given to Marshall when he executed the security in August 1811? I think it is impossible to read the note, and deny that that was the effect of it; for with respect to this L. 39,000 he says, I will not only give you a note, but will cover all

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my real property with a security for the payment of it against Martinmas next; and whether it was a year or seven days makes no difference in the principle. The principle of law established in Scotland, as well as in this country, is, that if a party chuses to give time to a principal, without communication with his surety, his doing so exonerates his surety; and for the plainest of all possible reasons, that if they went against the principal for this L. 99,000 before the term of Martinmas arrived, the principal would have a right to turn round and say, Don't call upon me, I have made a contract with the Bank that they shall not call upon me till Martinmas.

But, then, it is said, that this security is taken without prejudice to the sureties. My Lords, I apprehend that will not protect parties in a case of this sort. We do not find that the Bank wrote to the sureties, saying, With respect to this large sum of L. 99,000, for which these agents are liable; and for which you are ultimately liable if they do not pay; we think it right to make this arrangement; we suppose you will not dissent from it, for it will be a benefit to you, because we take a security over the whole of this property. My Lords, if the cautioners had been consulted, there would have been no difficulty; but the Bank came to this arrangement without any communication with them. I put it to the gentleman who argued this case with great ability, on the part of the respondents, and he had great difficulty in answering, whether Marshall could have been sued in the mean time? At that time I desired to see a statement of the account subsequent to the period of August 1811, which has been furnished to me very properly by the agents on both sides; and the one side contended, that notwithstanding this security, it was competent for the Bank in the mean time to proceed to execution during the intervening period. I cannot, however, help thinking, if they had taken any step before Martinmas arrived to enforce their contract, it would have been certainly a breach of contract against this gentleman; and I doubt very much whether they could have enforced their contract against him. Then, my Lords, with respect to the question of a claim under these circumstances against the sureties, there is a case I should have cited to your Lordships were it not that the principle is well established. It is a case in Vesey, in which the former cases were referred to. In this country that principle is perfectly established. I observe the Lord Ordinary and the Court of Session have laid down the principle, that if nothing is done after the agent has ceased to act as such, by way of prejudicing the right of the sureties, they are liable. Now, if that be the view of the Court of Scotland, I apprehend it is not conformable to the law of this country or of that country. They say, that nothing was done after the agency of William and John Marshall at Perth had ceased, which could injure the suspenders' right of relief. The question is not merely with respect to what was done after the agency, for if they did any thing which had that effect during the agency, it discharges the sureties as much as if they did it afterwards. If the Court of Session meant to say, that, if



June 11: 1824. this took place after the agency ceased, it would discharge them, I am not aware of any such distinction in the law either of Scotland or England. In this case, therefore, my Lords, I am under the necessity of saying, that I cannot concur in the interlocutors which have been pronounced by the Court of Session. Those who hold such securities are not to relax all diligence on their part with respect to the principal, who is their servant. They are bound to use all due diligence; and I say in this case, when, almost immediately after the bond given in 1809, they found that one of these persons in breach of his duty was making use of their funds most improperly to support a trade, of which, from the extent to which they carried on, there could be but one termination, namely, the insolvency and bankruptcy which took place in two years; it does appear to me, it was their bounden duty to put a stop to such proceedings, or if they could not put a stop to them, to dismiss these persons as their agents; or if they did not think fit to do that, I think they have no right to call on these cautioners to indemnify them for those sums which were not bona fide intrusted to these individuals as their agents; and supposing even that was not the case, this extension of time given under the security in 1811, does appear to me to have amounted to a release of the sureties. My Lords, I must confess that, in my view of the case, although it is with great regret that at any time I differ in opinion with the Court of Session, I am compelled to do so on the present occasion. It was argued at the Bar, whether, although this interlocutor might be reversed, and the suspension sustained as far as with regard to the L.39,000,—whether, if any debt has subsequently accrued from these agents, the cautioners might not be liable? but, after considering that question, and examining the circumstances of the case, it appears to me that what took place in 1811 not only exonerated the sureties in respect of the large debt, but also exonerated them from any future debt these agents might incur. Under all the circumstances, I must humbly propose to your Lordships to reverse these interlocutors.

*Appellants' Authorities.*—Smith, 1. Dow, 296.; Rees, 2. Vesey, Jun. 540.; Samuel, 3. Meriv. 272.; 5. T. R. 513.; 18. Vesey, 20.; 2. Taunt. 206.

J. RICHARDSON—J. CHALMER,—Solicitors.

(*Ap. Ca. No. 57.*)

WILLIAM JEFFREY, and the Representatives of ROBERT  
WATSON, Appellants.—*Warren.*

No. 44.

WILLIAM BROWN and Others, Respondents.—*Jeffrey.*

*Trustee—Bankrupt—Sequestration—Appeal.*—Circumstances under which (affirming, but qualifying the judgment of the Court of Session) it was held, 1. That the trustee on a sequestrated estate was liable personally to implement a contract entered into by him on behalf of the estate; and, 2. That an appeal against the interlocutor of a Lord Ordinary not brought under review of the Inner-House was incompetent.

THE respondents, Brown and others, were the proprietors of the ship *Jean of Irvine*, which, in 1806, they sold by a missive of sale to John M'Arthur and Company, merchants in Glasgow. Previous to the execution of the missive (which was not in terms of the Registry Acts), M'Arthur and Company had obtained possession of the vessel, and sent her with a cargo to New York, and from thence to the West Indies, and then to Liverpool; and in the course of these voyages a considerable freight was earned; but, at the same time, several debts were contracted on account of her. No part of the price had been paid. M'Arthur and Company having, before her return to Liverpool in December 1807, become bankrupt, and their estates having been sequestrated, Robert Watson was elected trustee. On her arrival the respondents took possession of her, and caused her and the goods aboard of her to be detained for payment of the freight, which they claimed in security of payment of the price, and relief of the claims which might be brought against them as the registered owners. An intermediate arrangement was then made between the respondents and Watson, with the approbation of the commissioners on the estate, by which the vessel was placed at the disposal of a Mr Mathie, for behoof of both parties. By Mathie she was exposed to sale by auction, and was purchased by the respondents at L.1200. They then sold her for L.1500; and thereafter the respondent, Brown, on behalf of himself and the other owners, on the 22d August 1808, addressed to Watson, as trustee, and to the commissioners on the estate of M'Arthur and Company, this letter:—‘ On the arrival of the ship *Jean* at ‘ Liverpool, we ordered our agent to take possession of the ship ‘ and freight, as security for the purchase-money agreed to be ‘ paid by John M'Arthur and Company, per minute of sale, ‘ amounting to L.2000, with interest. Since which we have sold ‘ the ship for L.1500, and our agent has secured the freight for ‘ our benefit; but, in consideration of your fulfilling the agree-

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June 11. 1824. 'ment made with John M'Arthur and Company, of paying as  
 ' the sum of L.2000 Sterling, the agreed on price, with interest  
 ' thereon since it became due, and also freeing and relieving us  
 ' from all debts contracted by John M'Arthur and Company, or  
 ' their agents, for said vessel, from the time they took possession  
 ' and fitted her out at Greenock until the sale took place in Liver-  
 ' pool, we hereby agree to give up all claim we have to the said  
 ' freight, &c.; and we will authorize our agent to settle with you  
 ' all accounts of said ship, on our receiving the said sum of  
 ' L.2000, with interest. You will receive with this a letter,  
 ' signed by the trustees for the creditors of the deceased Captain  
 ' Service, who held a share in the said ship Jean, binding them-  
 ' selves to pay what proportion of debt may come against the  
 ' vessel, so far as he was concerned; and also binding themselves,  
 ' if there shall be any balance owing by the said Captain Service  
 ' to John M'Arthur and Company, to pay said balance to John  
 ' M'Arthur and Company's trustee, without deduction, as soon  
 ' as this shall be ascertained. And both parties agree to the ex-  
 ' tending of this missive upon stamped paper, when called for.'  
 In answer, Watson and the commissioners wrote to the respon-  
 dents, that ' We the trustee and commissioners on the seques-  
 ' trated estate of John M'Arthur and Company, and we also the  
 ' trustees for the creditors of the deceased Captain George Ser-  
 ' vice, agree to your proposal contained in your letter of the 22d  
 ' August, by paying you the purchase-money agreed to be paid  
 ' you by the said John M'Arthur and Company, as per minute  
 ' of sale, dated 15th November and 25th December 1806,  
 ' amounting to L.2000, with interest, upon condition of your  
 ' procuring us an obligation from the trustees of the creditors of  
 ' the deceased Captain George Service, who also held a share in  
 ' the Jean, agreeable to the terms in your letter; and in all other  
 ' respects, we hereby agree to your proposal.' In consequence  
 of this acceptance of the offer, the respondents wrote to Watson,  
 stating, that ' According to the agreement made between us  
 ' and John M'Arthur and Company's commissioners, and you as  
 ' trustee, of paying us the price of the ship Jean, say L.2000,  
 ' with interest thereon since it became due, and your obligation  
 ' to free and relieve us from all claims that may come against us  
 ' from the time that J. M'Arthur and Company took possession  
 ' of her in Greenock until she was sold in Liverpool, you will  
 ' please remit us the balance of the price now due us. We have  
 ' had L.1488. 18s. 7d. remitted us by Mr Hugh Mathie, in bills  
 ' on London. After receiving the balance we will write our

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‘agent, Mr Hugh Mathie, to settle with you all accounts of said ship. We will write to Mr William Hamilton to get the minute of sale from Mr David Lang, with whom it lies, to enable you to calculate the interest, and settle accordingly. We are,’ &c. After giving credit for the L.1500, which had been received by the respondents from the purchaser of the vessel, and for the freights which they had drawn, there remained a balance due to them of the price and interest of L.679, which was paid to them by Watson. Various claims were afterwards brought against the ship, by persons who had advanced goods and money on account of her in the course of the above voyages, and for payment of which decrees were obtained against the respondents as the registered owners. An action of relief was then raised by them before the Admiralty Court against Watson, founding on the original missive of sale, and the subsequent transactions which had taken place, and concluding against him as trustee for relief of these debts. In defence Watson maintained, that as neither the original missive nor the subsequent letters were stamped, nor expressed in terms of the Registry Acts, the action could not be maintained; and, at all events, as he had not sufficient funds from which to pay the claim, he could not be subjected in payment beyond those in his hands. The Judge-Admiral repelled ‘the defence founded on the allegation that the minute of sale is not stamped, in respect the libel is not founded upon that minute of sale, but on the subsequent transaction: Repels also the defence, that the subsequent missives of agreement are not stamped, in respect the transaction was in re mercatoria, and in respect that that transaction was entered into with the pursuers and the defender for behoof of creditors of M<sup>r</sup>Arthur and Company, and with the consent and approbation of a number of the creditors, and that the defender ought to have retained in his hands funds sufficient to answer the present claim: Repel the defences upon the merits, and decern against the defender in terms of the libel;’ and found Watson liable in expenses, amounting to L.44. Watson then presented a bill of advocation, which having come before Lord Cringletie, his Lordship refused it for the reasons explained in the following note:—‘The Lord Ordinary has advised this bill, which he did not understand till he looked into the proceedings before the Admiral. The pursuers, by minute of sale in 1806, sold the ship Jean to M<sup>r</sup>Arthur and Company, at a price of L.2000; after which the purchasers sent her on a voyage from Greenock to Trinidad; from thence to New York; back again

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' to the West Indies, and thence to Liverpool. It is said, that  
 ' the minute of sale is void and null, as not having been executed  
 ' in conformity to the statutes for registering vessels, and that  
 ' M'Arthur and Company did not complete their title to the  
 ' ship, by becoming registered owners thereof. Be it so; in  
 ' which case the pursuers continued to be owners, and of course  
 ' had the only title to the ship, and all the profits earned by her.  
 ' Before she arrived in Liverpool, M'Arthur and Company were  
 ' bankrupts; the pursuers arrested the vessel when she did arrive,  
 ' and, by agreement with the trustee for M'Arthur's creditors,  
 ' she was then sold, and the price paid to the pursuers. But  
 ' they had the same right to the freights that they had to the  
 ' ship, and this right they gave up by their letter of the 22d  
 ' August 1808, under the conditions therein mentioned, which  
 ' offer was accepted by the defenders; and the Lord Ordinary  
 ' sees it stated in the answers for the pursuers, and he does not  
 ' see it gainsaid in this bill, that the defenders did receive the  
 ' freight. How, then, is it possible to maintain, after the bar-  
 ' gain was implemented by their receiving the freight, that they  
 ' are not obliged to fulfil the conditions under which they were  
 ' permitted to receive it? To the Lord Ordinary the plea is un-  
 ' tenable. The stamp laws have nothing to do with the ques-  
 ' tion. The very nullity of the minute of sale gave rise to the  
 ' bargain between the parties; for had the minute not been null,  
 ' the pursuers would not have had right to the ship and freight;  
 ' and that right to the freight they gave up by letter, which re-  
 ' quired no stamp, being a transaction in re mercatoria. As to  
 ' the conditions expressed in the acceptance of the defenders, viz.  
 ' the procuring an obligation from the trustees of Captain Ser-  
 ' vice, it does not appear distinctly how the matter stands. If  
 ' the defenders did not think the transaction complete till they  
 ' got that obligation, they should not have interfered with the  
 ' freight. But they did interfere. The probability is, that the  
 ' defenders did get that obligation; and one thing seems clear, viz.  
 ' that the defenders have not shewn any injury by their not getting  
 ' that obligation, if in truth they did not get it, which the Lord  
 ' Ordinary rather inclines to think they did obtain.' Against  
 this judgment Watson did not reclaim, and the decree having  
 been extracted, and a charge given to him personally, he pre-  
 sented a bill of suspension, in which he maintained, inter alia,  
 that he was not liable to personal diligence, unless the res-  
 pondents could shew that he was possessed of funds; which he  
 was not. The bill was passed upon caution, and the appellant,

Jeffrey, (who was Watson's brother-in-law), thereupon bound June 11. 1824. himself as cautioner, in the usual terms, for implement of the decree, and payment of expenses. On the case coming before Lord Pitmilly, his Lordship repelled the reasons of suspension, and found the letters orderly proceeded. Watson then tendered his resignation of the office of trustee, which was accepted, and Jeffrey was appointed in his place. A representation was then lodged in name of both these parties, Watson praying to be allowed to withdraw from the process, and Jeffrey to be sisted as a party. An additional representation was afterwards lodged for Jeffrey; but the Lord Ordinary refused (except as to sisting Jeffrey) both of these representations, adhered to his interlocutor, and found both Watson and Jeffrey liable in expenses. Jeffrey then presented a petition against these judgments to the Second Division; but Watson did not reclaim, so that they became final as to him; and the Court, on the 7th of July 1819, on advising the petition, with an additional one, adhered. On the same day Watson presented a petition to the First Division, praying for decree of exoneration, which was granted. Against this the respondents reclaimed, on the ground that their claim against Watson personally ought to be reserved; but the Court refused their petition as unnecessary. Jeffrey then reclaimed a second time; but his petition not having been regularly boxed, was refused as incompetent, and as to this judgment their Lordships adhered upon the 2d of March 1820. The decree having been extracted, and Watson being dead, a charge was given to Jeffrey, who thereupon presented a bill of suspension, in which he maintained, that he was not personally liable either as trustee, seeing that he had no funds; nor as cautioner for Watson, because he had only bound himself that he should account qua trustee, so that he could not be more extensively liable than him; and the respondents were bound to proceed against the creditors on the estate.

Lord Cringletie refused this bill with expenses, 'in respect that it is now a res judicata that Mr Watson is personally liable for the sums charged for, and that the complainer was not only his cautioner in the suspension complaining of the judgment of the Judge-Admiral decerning against him personally, but also sisted himself in said suspension, in which the letters were found orderly proceeded, whereby this suspension is an attempt to open up a res judicata;' and his Lordship at the same time issued the following opinion:—'The Lord Ordinary cannot assent to the proposition, that a trustee is not liable for the expense

June 11. 1824. ' of a law-suit in which he embarks. It is his duty to lay by a  
' sum to meet a contingent claim, and if he do not lay it by, he  
' is answerable. He alone knows who his constituents are, and  
' what the funds under his management. If, therefore, he engage  
' in a law-suit, from which money is to be recovered from his con-  
' stituents, the burden ought to lie on him who knows who they  
' are, and who ought to have provided for it before commencing  
' the law-suit, and not the opposing party, who neither knows  
' who are the constituents of the trustees, nor the funds under his  
' care. As for the principal sums decreed for, the judgment is a  
' res judicata, and proceeded on the principle, that the trustee  
' bound himself personally to the chargers.'

Jeffrey then presented a second bill, which was refused by Lord Bannatyne, who stated the grounds of his judgment in these terms:—' In explanation of the grounds on which the Lord  
' Ordinary considers the first bill to have been properly refused,  
' and holds himself bound to refuse the present, the Ordinary  
' thinks it right to notice, first, That while, were the question  
' open either as to Robert Watson, the original trustee, between  
' the claim against whom and the now complainer; who, while  
' he has succeeded him as trustee, became a party in the suspen-  
' sion; as cautioner for him, there is no room for distinction in  
' the circumstances of this case; while the claim rests on an ob-  
' ligation come under by Watson himself, there seems no room  
' for doubting as to his personal responsibility, and the less hard-  
' ship in his being so found, that he had himself to blame for  
' parting with the funds which should have answered it; and  
' even after doing so, was entitled, as he and they seem to have  
' contemplated at the time of his coming under it, to call on the  
' creditors among whom they were divided, to indemnify him.  
' Secondly, That were there otherwise grounds for the pleas of  
' the complainer, they appear to be quite inadmissible, in oppo-  
' sition to the decret in foro of this Court, obtained in discuss-  
' ing the suspension of the Judge-Admiral's decret; and even  
' supposing this last to have been challengeable, as *ultra petita*  
' of the libel in that Court, a challenge on that ground would  
' now be inadmissible, as a plea competent and omitted in the  
' discussion of the suspension.'

To these judgments the Court adhered on the 5th of July 1821.\*

An appeal was then entered against all the judgments, both by

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\* See I. Shaw and Ballantine, No. 129.

Jeffrey and by the representatives of Watson, in support of June 11. 1824. which they maintained,—

1. That in so far as the action was founded upon the original missive of sale, it could not be supported, because that missive was neither stamped, nor was it framed in terms of the Registry Acts; and the same objections were applicable also to the letters which had passed between the respondents and the trustee, in so far as they could be held to relate to a sale of the vessel.

2. That as the trustee had been induced to enter into the transaction, on the footing that a good and binding sale had been effected by that missive, which, in point of law, had not been the case, he had been led into it *errore juris*; and as he would be entitled upon that ground to maintain an action of repetition, so he could not be liable to implement it.

3. That supposing there had been no error, it was *ultra vires* of Watson, as trustee, to enter into any transaction which was of the nature of an adventure or speculation; because the object of the Bankrupt Act was to realize the funds of the estate for division among the creditors, and consequently the powers of the trustee were limited accordingly; so that the agreement was liable to challenge upon this ground, and therefore could not be enforced. And,

4. That at all events, both from the mode in which the action was libelled, and from the nature of the office which both Watson and Jeffrey held, they could not be liable to any greater extent than the trust-funds of which they might be in possession, and were not bound to find funds in order to satisfy the claim of the respondents; and therefore, as they had no trust-funds, the judgments of the Court finding them personally liable were erroneous.

To this it was answered,—That the appeal was incompetent, in so far as regarded the representatives of Watson, who had not reclaimed against the interlocutor of Lord Pitmilley; and on the merits,—

1. That although the missive of sale was narrated in the summons, yet it was not founded upon that document as being legally binding; but, on the contrary, was rested on the contract with Watson, which was entered into on the footing of the missive not being effectual: That this contract was not one for the sale of a vessel, but was a bargain by which the price and freights of the ship were sold to Watson on behalf of the creditors, in consideration of the payment to the respondents of a certain sum of money, and of relieving them against claims on the vessel; so



June 11. 1824. that the letters in relation to it fell under the exception in the Stamp Act, as referring to an 'agreement made for or relating to the sale of goods, wares, or merchandise,' and could not be affected by the Registry Acts. That, besides, it was proved by other evidence, and by the judicial admissions of the appellants, that such a transaction had taken place; and consequently, independent of the letters, it was binding and effectual.

2. That it was not relevant to allege that the transaction had taken place under an error in point of law, and in fact it had not so.

3. That as a trustee on the sequestrated estate was vested with the full powers of the creditors, and as it was quite competent for the creditors to enter into any contract with a third party, the trustee under such powers could do so; and if he had exceeded his powers, he was undoubtedly liable personally to implement the contract, so that the plea of ultra vires could not be available to the appellants. And,—

4. That although it was true, that the trustee on a bankrupt estate did not become personally liable for payment of the debts of the bankrupt, yet if he entered into any contract with a third party, he was personally bound to implement it; and it was no answer to say, that he had no funds for doing so, because he was bound, before making the contract, to see that he had the means of performing it, and consequently was compellable by the diligence of the law to implement it, reserving to him his relief against the creditors.

The House of Lords ordered and adjudged, 'That in so far as the interlocutors complained of, or any of them, are interlocutors of the Lord Ordinary not submitted by the said Robert Watson to the review of the Judges of the Division to which the said Lord Ordinary belonged, the said appeal be dismissed this House as incompetent; and that the other interlocutors complained of be affirmed, without reference to any special finding in any of the said interlocutors; as to which the Lords do not, viewing all the circumstances, think it necessary to come to any determination; and it is further ordered, that the appellants do pay to the respondents the sum of L. 100 for their costs.'

*Appellants' Authorities.*—Stirling, July 26. 1733, (2930.); Carrick, August 5. 1778, (2931.); Keith, Nov. 14. 1792, (2933.); 1. Bell, 446.; 4. Ersk. 3. 3.

J. CHALMER—J. RICHARDSON,—Solicitors.

(*Ap. Ca. No. 58.*)

ROBERT DAVIDSON, Appellant.—*Abercromby*.

No. 45.

GEORGE LOCKWOOD and Company, Respondents.—*Jeffrey—  
Buchanan*.

*Appeal—Jurisdiction—Repetition of Expenses.*—The Court of Session having suspended a charge on a bill against an indorser, and found the charger liable in expenses, which he was compelled to pay; and the charger having appealed against the interlocutor; and a decree of reduction of the bill, pending the appeal, having been obtained by the drawer; and the House of Lords having reversed the interlocutor, and remitted to the Court of Session to make certain investigations; and the Court of Session having, in respect of the decree of reduction, refused to order the expenses to be repaid to the charger, and found it unnecessary to proceed with the remit;—Held, (reversing the judgment of the Court of Session), 1. That the Court was bound to have carried the remit into execution; and, 2. That the charger was entitled to repetition of the expenses.

GEORGE LOCKWOOD and Company, manufacturers at Huddersfield in Yorkshire, were in the custom of consigning goods for sale to their agents, Mason, Baird and Company, of Aberdeen; and that latter Company, in the month of April 1809, acting on behalf of Lockwood and Company, sold woollen goods of the value of L. 1492. 14s. 9d. to a Company carrying on business at Aberdeen with Quebec, under the firm of John Robertson and Company. This Company consisted of Patrick Baird, (who was also a partner of Mason, Baird and Company), of John Robertson, and also (as was alleged) of William Carlier, in Aberdeen. On the 22d of January 1810, Mason, Baird and Company, drew a bill for the above sum upon Robertson and Company, payable three months after date, bearing to be for value in cloth to Quebec, and which was accepted by John Robertson, under the firm of John Robertson and Company. Mason, Baird and Company then indorsed the bill to Lockwood and Company, and immediately, and as per procuration of them, they indorsed it to Andrew Davidson, who again indorsed it to his brother, the appellant, Robert Davidson. By him it was indorsed to another party, and after passing through several other hands, it was ultimately returned upon him, and the subsequent indorsations scored.

It appeared that, on the 12th of February 1810, Mason, Baird and Company drew another bill on John Robertson and Company, for precisely the same sum, and in the same terms, with the exception that it was payable sixty-five days after date, which, having been accepted (as was alleged) by Robertson and Company, was transmitted to Lockwood and Company. During the currency of these bills, and in the month of March, the

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June 15. 1824: estates of Mason, Baird and Company were sequestrated; and when the bills fell due, the appellant raised diligence on his bill against Robertson and Carlier, as partners of John Robertson and Company, and Lockwood and Company as indorsers. At the same time, Lockwood and Company charged Robertson and Carlier on the bill which they had acquired. Bills of suspension were then presented by Robertson and Carlier, and Lockwood and Company, which having been passed, a process of multiplepoinding was raised in name of the partners of Robertson and Company, stating that they could only be liable in once and single payment of the L. 1492. 4s. 8d. contained in the two bills, and that one of them must have been granted fraudulently, or was fictitious. After a great deal of procedure, the Court found that Carlier was not bound as a partner of Robertson and Company; that Mason, Baird and Company had no authority to indorse as per procuracy of Lockwood and Company; that that Company were alone entitled to recover payment; and therefore suspended the charges at the instance of Davidson, found the letters orderly proceeded at the instance of Lockwood and Company against Robertson and Company, and preferred them in the multiplepoinding to the fund in medio, and also found Davidson liable in expenses to all the parties.

An appeal was then entered by Davidson, who was compelled under an order for interim execution to pay the expenses. Thereafter, and during the dependence of the appeal, the trustee on the sequestrated estate of Mason, Baird and Company, brought an action of reduction against Davidson of the bill and indorsations, on the ground that they had been made within sixty days of their bankruptcy; and after some litigation, he obtained decree on the 29th of January 1813, in terms of the libel. This decree was extracted, and it was admitted by the respondents that it had been duly certified and transmitted to London with the view of being founded upon in the House of Lords; but they stated, that they had been advised that, as it had not been in existence prior to the judgments appealed against, they were not entitled to produce it. On hearing the appeal, the House of Lords, on the 4th of July 1815, pronounced this judgment:—‘ It appearing to the Lords that the appellant ‘ has not appealed from or reclaimed against the interlocutor ‘ of the Lord Ordinary of the 29th of November 1810, in the ‘ process of multiplepoinding, finding the pursuers liable only in ‘ once and single payment, or from the interlocutor of the Lord ‘ Ordinary of the 28th of February 1811, conjoining the processes

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' of suspension with the multiplepounding; and that the appellant,  
 ' on the contrary, in his reclaiming petition against the interlocu-  
 ' tor of the Lord Ordinary of the 18th of June 1811, submitted  
 ' to the proceeding in the multiplepounding; the Lords cannot  
 ' proceed to determine whether the process of multiplepounding  
 ' was well raised or not: but on the bill of suspension for Wil-  
 ' liam Cartier it is ordered and adjudged, by the Lords spiritual  
 ' and temporal in Parliament assembled, that the several inter-  
 ' locutors complained of in the said appeal, so far as they sus-  
 ' tain the said bill of suspension for William Cartier, be, and  
 ' the same are hereby reversed; and with respect to the bills of  
 ' suspension of the said John Robertson, and of George Lock-  
 ' wood and Company, as conjoined with the process of multiple-  
 ' pounding, it is farther ordered and adjudged, that the several  
 ' interlocutors complained of in the said appeal be, and the  
 ' same are hereby reversed. And it is ordered, that the cause  
 ' be remitted to the Court of Session in Scotland, to review  
 ' (receive) such evidence as may be properly offered with respect  
 ' to the two bills of exchange in question, and particularly to  
 ' receive evidence upon the facts stated in the appellant's con-  
 ' descendence, and in the answers of the respondents George  
 ' Lockwood and Company thereto, as to the nature of the deal-  
 ' ing of the respondents, George Lockwood and Company, with  
 ' Mason, Baird and Company, and the authority which Mason,  
 ' Baird and Company had to indorse the bill of exchange of the  
 ' 22d of January 1810, as by procuration of the respondents,  
 ' George Lockwood and Company, so as to make the respon-  
 ' dents liable to the payment as indorsers of the said bill, or in  
 ' any manner to transfer such bill to Andrew Davidson, notwith-  
 ' standing the indorsement made by Mason, Baird and Company  
 ' in favour of the respondents, George Lockwood and Company,  
 ' either by striking out the said indorsement in favour of the  
 ' respondents, George Lockwood and Company, or otherwise,  
 ' without making the said respondents, George Lockwood and  
 ' Company, liable as indorsers of the said bill.' When the case  
 returned to the Court of Session in order to have this judgment  
 carried into effect, the Court remitted it to Lord Reston, but  
 refused to order repetition of the expenses which had been paid  
 by Davidson. On coming before his Lordship, the respondents  
 founded upon the decree of reduction as depriving Davidson of  
 all right to go on with the litigation; and Davidson thereupon  
 intimated his intention to raise an action of reduction reductive.  
 Having, however, failed to do so, Lord Reston, in absence, pro-  
 nounced judgment against him. He then represented, and the

June 15. 1824. case having come before Lord Cringletie in place of Lord Reston, his Lordship pronounced this interlocutor:—‘ In respect that the bill for L. 1492. 14s. 9d. was made by Mason, Baird and Company as drawers thereof, and indorsers to the representer; and that their trustee, in their right, has set aside that bill by a regular decree of reduction thereof, obtained against the representer and all other parties interested in the same, declaring it to be, and to have been, from its date, void and null; finds, that the respondents are entitled to found upon that decree, because, were they to pay the bill, they would have no relief against Mason, Baird and Company, the prior indorsers, nor from the acceptor, because their right of relief is also cut off against the drawers, to whom the bill was accepted without value, if the other bill for L. 1492. 4s. 8d. be effectual. But as the said decree of reduction took away the title of the representer to insist in his appeal in the House of Lords, as it is now pleaded to do in this Court; as it is dated above two years prior to the discussion of the appeal, and has on it a certificate for the purpose of enabling the parties to found on it in that Right Honourable House, the Lord Ordinary appoints parties to be ready to debate on the question, whether, as to the respondents, and the other parties in this cause, any plea arising on the said decree is not to be held either as proponed or repelled, or as competent and omitted.’ Davidson represented against the findings in this judgment; and, on hearing parties on the whole cause, his Lordship ordered memorials to the Court on these points:—1st, ‘ Whether the respondents are, or not, entitled to plead on the decree of reduction of the bill for L. 1492. 14s. 9d. obtained by the trustee for Mason, Baird and Company, for their behoof? and, 2dly, ‘ Whether, by the judgment of the House of Lords, the respondents are or are not precluded from setting up any plea on that decree, owing to its being properly to be considered a plea either competent or omitted in that Right Honourable House, or proponed and repelled by it?’ On advising the case, their Lordships found, that ‘ as the bill is now reduced, it is unnecessary to proceed in the remit from the House of Lords;’ and found the respondents entitled to expenses. Davidson then raised an action of reduction reductive of the decree; and having reclaimed, the Court superseded his petition till the issue of that reduction. Against this order the respondents presented a petition, and the Court thereupon recalled it, and adhered to their judgment, ‘ finding it unnecessary to proceed in the remit from the House of Lords in hoc statu,

‘and finding Robert Davidson liable in expenses of process.’ June 15, 1824.  
 To this judgment they adhered on the 11th of January 1820;  
 and ‘in respect the bill is now reduced and set aside, they find  
 ‘it unnecessary to proceed in the remit from the House of  
 ‘Lords.’\*

Davidson then entered another appeal, and maintained,—

1. That it was the imperative duty of the Court of Session to have obeyed, and carried into execution, the order and remit of the House of Lords; and that they were not entitled to refuse giving effect to that order on the ground of proceedings having been adopted during the dependence of the appeal, and of the decree of reduction, which was just to maintain, that the judgment of the Inferior Court might defeat the orders of the Supreme Tribunal; and, therefore, that the Court of Session ought to be enjoined to carry the judgment of their Lordships into immediate execution.

2. That the Court of Session were not entitled to refuse to the appellant a warrant for repayment of the expenses which he had paid under the order for interim execution, seeing that the interlocutors finding him liable in expenses had been reversed.

3. That as the decree of reduction had been obtained by the trustee of Mason, Baird and Company, to the effect of setting aside the indorsation of that Company to Lockwood and Company, and of any obligation contracted by the former of these Companies, whereby any claim could be made on their estate, this could never have the effect of depriving the appellant of his right to proceed against any other prior indorser; and as Lockwood and Company stood in this situation, it was *jus tertii* to them to plead upon the decree of reduction. And,

4. That even supposing they had a title to found upon the decree, they ought to have done so when the case was pleaded in the House of Lords; and if they did not do so, they had no right to resort to it now, because it must be held as falling under the plea of competent and omitted; and if they did found upon it, then it was proponed and repelled.

To this it was answered,—

1. That as the decree of reduction was in general and unqualified terms, whereby the right of the appellant to the bill was completely extinguished, and his title to insist upon the bill as a document of debt completely set aside; and as it could not competently be brought under the consideration of the House of

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\* Not reported.

June 15. 1824. Lords on occasion of the first appeal, and could only be founded upon when the case returned to the Court of Session; the respondents had a manifest interest in the decree, and the Court of Session were as much bound to give effect to it, as if an actual discharge had been produced under the hands of the appellant; and therefore that Court acted correctly in finding it unnecessary to proceed with the remit. And,

2. That if that decree had the effect to deprive the appellant ab initio of any right in the bill, then he could not competently demand the expenses of any part of the proceedings adopted by him in order to enforce that right.

The House of Lords found, 'That the Court of Session ought to have applied the judgment of this House in the terms thereof; and as by that judgment the interlocutor of the 16th of January 1812 was, with other interlocutors, reversed, the appellant, upon the cause being remitted to the Court of Session according to the said judgment, was entitled to a repetition of the costs paid by him in pursuance of that interlocutor. It is therefore ordered and adjudged, that the interlocutors complained of in the present appeal be reversed; and it is further ordered, that the cause be remitted back to the Court of Session, to proceed therein according to the judgment of this House pronounced on the 4th of July 1815.'<sup>\*</sup>

J. DUTHIE— FRASER,—Solicitors.

(Ap. Ca. No. 60.)

No. 46.

ROBERT DAVIDSON, Appellant.—*Abercromby*.

GEORGE LOCKWOOD and Company, Respondents.—  
*Jeffrey—Buchanan*.

*Bankrupt—Sequestration*.—The trustee on a sequestrated estate having obtained a decree of reduction of a bill, on which a party claimed against the estate; and that party having brought a reduction reductive of the decree; and a majority of the creditors assembled at a meeting having resolved that this action should not be opposed, and that the decree should be allowed to be set aside; and the Court of Session having found that a majority had no power to do so;—Held, (reversing the judgment), That the majority had that power, and that their resolution was binding on the minority.

<sup>\*</sup> See Lord Gifford's Speech, p. 365.

THIS case was connected with the preceding one, to which reference is made. After the remit there mentioned by the House of Lords, Davidson brought an action of reduction reductive of the decree of reduction of the bill which had been obtained by the trustee of Mason, Baird and Company, and appearance was made by the trustee as a defender. On the 15th of June 1816 a meeting of the creditors of Mason, Baird and Company, was held for the purpose of choosing a new commissioner, and upon this occasion the creditors resolved, that the trustee should withdraw any further opposition to the action of reduction reductive, and should rank Davidson upon the estate for the amount of the bill. No complaint was made of this resolution, and Davidson having founded upon it in the action of reduction reductive, Lord Alloway, before whom it came, reported the case to the Court, 'in respect of the resolution of the meeting of creditors of 15th June 1816, and of the other proceedings depending in the Inner-House, in consequence of a remit from the House of Lords.' On advising the cause, their Lordships 'superseded the consideration thereof, until the trustee calls another regular meeting of the creditors to consider the matters at issue, upon due notification given of the special purpose for which it is to be held.' A meeting was accordingly held on the 2d of July 1819, when, after various objections were stated hinc inde to votes, a majority of the creditors 'agreed to the resolution of the former meeting of creditors, held on the 15th day of June 1816, agreeing to withdraw any further opposition to the action of reduction at Mr Davidson's instance.' Against this resolution, Lockwood and Company, as creditors on the estate, presented a petition and complaint, in which they prayed the Court to 'find, that the proceedings of the said meeting have been irregular, void, and null; and that the pretended resolution to abandon the decree of reduction, and to offer no further opposition to the action of reduction reductive, is ultra vires of the persons joining in and supporting the same, and is not binding on the petitioners or the creditors at large, but is radically null and void, and that the trustee is bound to go on with the case; or, at all events, that the petitioners, who are willing to do so at their own expense, are entitled to an assignment to the debt and diligence on that condition.'

Lord Glenlee, as Ordinary on the Bills, granted warrant of service; and Lord Robertson, also as officiating on the Bills, reported the case to the First Division, when their Lordships, on

June 15. 1824.

1st DIVISION.  
Lords Glenlee  
and Robertson.



June 15. 1824. the 18th November 1819, 'sustained the petition and complaint, 'and found the proceedings of the meeting of creditors on 2d of 'July last are void and null, and cannot set aside or otherwise 'affect the interest of Messrs Lockwood and Company, the petitioners in the decree of reduction presently depending in 'Court, and found them entitled to expenses.' \* Davidson then entered an appeal against this judgment, and maintained,—

1. That as, by the Bankrupt Act, a majority of the creditors have right to give directions to the trustee, relative to the management, disposal, and recovery of the estate, and as a resolution of the majority binds all the other creditors, it was within the power of a majority to instruct the trustee to abandon the decree of reduction; and as a majority had come to that resolution, and as the right of doing so belonged to the creditors alone, it was not competent for the Court of Session to controul the majority in the exercise of that right; and therefore the judgment finding that the resolution was void and null, was contrary to law, and was an assumption by the Court of the power vested in the creditors, or the majority of them, by the statute. And,—

2. That the meeting had been called by the orders of the Court itself, to consider and decide upon the propriety of abandoning the decree; which necessarily implied, that if the creditors came to a resolution to do so, it would be good and effectual; whereas, by the judgment complained of, the Court had found that the meeting could not come to such a resolution, which was inconsistent with their own order.

To this it was answered,—

1. That in truth there was not a majority in support of the resolution; but supposing there had been so, a majority had no power to surrender or abandon the decree of reduction, which was a security belonging to the trust-estate, and, like any other part of its property or effects, could not be relinquished without the unanimous concurrence of the creditors. And,—

2. That at all events the respondents were entitled, without the consent of the creditors of Mason, Baird and Company, to support the decree of reduction, and to resist the attempt of the appellant to set it aside.

The House of Lords 'ordered and adjudged, that the interlocutors complained of be reversed; and it is further ordered, 'that the petition and complaint of the respondents be dismissed.'

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\* Not reported.

**LORD GIFFORD.**—There were two cases before your Lordships some time ago, in which Robert Davidson was the appellant, and Lockwood and others were the respondents, in which there were appeals against certain interlocutors of the Lords of Session, which are brought before the House under the circumstances which I shall state to your Lordships. My Lords, this case was before your Lordships' House in the year 1815, in consequence of various interlocutors which had been pronounced by the Court of Session, in a proceeding between these parties—Mr Davidson, the appellant, claiming to recover the sum of L.1492. 14s. 9d. as the indorsee of a bill of exchange, which had been indorsed to him by his brother, Mr Andrew Davidson, being previously indorsed to Mr Andrew Davidson by Mason, Baird and Company, as acting for Lockwood and Company. My Lords, in consequence of that appeal to your Lordships' House, your Lordships pronounced a judgment in the month of July 1815, by which the interlocutors complained of in the appeal, so far as they sustained the bill of suspension of William Carlier, were reversed; and with respect to the bills of suspension of John Robertson, and Lockwood and Company, as conjoined with the process of multiplepoinding, the several interlocutors complained of were reversed; and it was ordered, that the cause be remitted back to the Court of Session, to receive such evidence as might be properly offered with respect to the two bills of exchange in question; and particularly to receive evidence upon the facts stated in the appellant's condescendence, and in the answers of the respondents, Lockwood and Company, as to the nature of their dealings with Mason, Baird and Company, and the authority which Mason, Baird and Company had to indorse the bill of exchange as by procuration for Lockwood and Company, so as to make the respondents liable to the payment as indorsers of the bill, or in any manner to transfer such bill to Andrew Davidson, notwithstanding the indorsement made by Mason, Baird and Company in favour of Lockwood and Company, either by striking out the indorsement in favour of Lockwood and Company, or otherways, without making Lockwood and Company liable as indorsers of the bill. June 15. 1824.

Your Lordships therefore perceive, that by this judgment of the House, the interlocutors complained of in the appeal were reversed; and it is worthy of attention, that by one of those interlocutors costs had been awarded against the appellant, Mr Robert Davidson, which, in the course of these proceedings, had been paid before the appeal was brought to your Lordships' Bar.

**My Lords.**—On the case going back to the Court of Session, for the purpose of having some inquiries made, and in order that when those inquiries were made, a decision might be come to,—it appears that when the case got back to the Court of Session, it was stated on the part of Lockwood and Company, that in the mean time, or rather before the appeal, an action had been brought by Thomson as trustee on the sequestrated estate of Mason, Baird and Company, for the pur-

June 15. 1894. pose of reducing the bill of exchange as against Mason, Baird and Company, and that judgment had been given in that action in favour of Thomson, reducing the bill of exchange. My Lords, it seems that on their setting up this decree in this action of reduction, it had been thought prudent on the part of Mr Davidson to endeavour to obtain a reduction of the decree in an action of reduction. On the present case coming before the Lord Ordinary, to apply the terms of your Lordships' remit, the Lord Ordinary pronounced an interlocutor of the 31st May 1816, stating, 'that in respect the petitioner, Robert Davidson, has failed to bring into Court the action of reduction reductive of the decret of reduction of the bill libelled on, therefore suspends the letters simpliciter in the suspension at the instance of Lockwood and Company against Robert Davidson, and decerns: Finds the letters and charge at the instance of Lockwood and Company, against John Robertson, and John Robertson and Company, orderly proceeded; and prefers Lockwood and Company to the sum in medio in said multiplepounding, and decerns in the preference, and for payment accordingly: Finds Lockwood and Company entitled to their expenses; appoints an account thereof to be given in, and when lodged, remits to the auditor of Court to tax the same and to report.'

My Lords,—A representation against this interlocutor was given in for the appellant, on advising which, with answers, Lord Cringletie, before whom the cause had come in the room of Lord Reston, pronounced a second interlocutor, stating, that 'in respect that the bill for L. 1492. 14s. 9d. was made by Mason, Baird and Company, as drawers thereof, and indorsers to the representer; and that their trustee, in their right, has set aside that bill by a regular decree of reduction thereof, obtained against the representer, and all other parties interested in the same, declaring it to be, and to have been from its date, void and null; finds, that the respondents are entitled to found upon that decree, because, were they to pay the bill, they would have no relief against Mason, Baird and Company, the prior indorsers; nor from the acceptor, because their right of relief is also cut off against the drawers, to whom the bill was accepted without value; if the other bill for L. 1492. 4s. 8d. be effectual; but as the said decree of reduction took away the title of the representer to insist in his appeal in the House of Lords, as it is now pleaded to do in this Court, as it is dated above two years prior to the discussion of the appeal, and has on it a certificate for the purpose of enabling the parties to found on it in that Right Honourable House, the Lord Ordinary appoints parties to be ready to debate on the question, whether, as to the respondents and the other parties in this cause, any plea arising on the said decree is not to be held either as proposed or repelled, or as competent and omitted.'

My Lords,—Against certain of these findings the appellant gave in a representation, and the Lord Ordinary having, in the mean time,

June 15. 1817.

heard parties on the effect of the decree of reduction, as formerly appointed by him, pronounced another interlocutor, by which he directed, 'that the parties should prepare memorials for the Lords of the First Division on the points alluded to in the representation; viz. first, Whether the respondents are, or not, entitled to plead on the decree of reduction of the bill for L. 1492. 14s. 9d. obtained by the trustee for Mason, Baird and Company, for their behoof? and, secondly, Whether by the judgment of the House of Lords, the respondents are, or are not, precluded from setting up any plea on that decree, owing to its being properly to be considered a plea either competent and omitted in that Right Honourable House, or proposed and repelled by it?' The memorials were accordingly given in, and the Lords of Session, on the 7th June 1817, pronounced an interlocutor, whereby they found, 'that as the bill is now reduced, it is unnecessary to proceed in the remit from the House of Lords: find Lockwood and Company entitled to expenses of process; allow an account thereof to be lodged, and remit to the auditor to tax the same.' Against this interlocutor a short petition was presented, on which the Lords pronounced this interlocutor:—'The Lords having heard this petition, supersede consideration of the same, and of the whole cause, until the first sederunt day of January next.' A petition having been presented by Lockwood and Company against this interlocutor, the following judgment was pronounced on the 10th of July 1817:—'The Lords having resumed consideration of, and advised this petition, with the petition of Robert Davidson; and having also heard Counsel on both sides, they recall their interlocutor reclaimed against by Lockwood and Company, refuse the prayer of the petition for Robert Davidson, and adhere to their interlocutor of 7th June, finding it unnecessary to proceed in the remit from the House of Lords in hoc statu, and finding Robert Davidson liable in the expenses of process.' The appellant considering himself materially aggrieved by the interlocutors I have mentioned to your Lordships, presented a reclaiming petition, and the Court thereupon pronounced the following interlocutor:—'The Lords having heard and considered this petition, they recall their former interlocutor now reclaimed against; and in respect the bill is now reduced and set aside, they find it unnecessary to proceed in the remit from the House of Lords, and decern.'

My Lords,—It appears, therefore, that the Lords of Session, under a notion that the bringing this action of reduction, which had taken place previous to the former decree of your Lordships, had done away with the necessity of proceeding in the action, they have undoubtedly abstained from executing your Lordships' directions, with respect to the inquiry which this House thought it necessary should be instituted for the purpose of determining this case between the parties; and they have also abstained from proceeding on two interlocutors actually reversed by your Lordships' House, by means of which interlocutors, costs, as I have stated to your Lordships, had been awarded against

June 15. 1834. the appellant, which the appellant, in the course of that proceeding, had actually paid, and which interlocutors were actually reversed in toto by your Lordships. The consequence has been, the appellant has not only derived no benefit from the inquiries directed by your Lordships, but has been deprived of the benefit of your Lordships' judgment in respect of those interlocutors as to the costs, which have been reversed. My Lords, I have no doubt the Lords of Session, in this case, have proceeded on the principle that they were doing justice to these parties, and that, under the circumstances of this case, it was unnecessary to conform to your Lordships' judgment; but it does appear to me, that the Court of Session, notwithstanding that decret of reduction, on which a great deal might be said, (for although the bill is reduced against Mason, Baird and Company, that will not prevent the appellant having recourse to Messrs Lockwood and Company, the prior indorsers of this bill), have not adopted the course which the circumstances required. I apprehend, the course of the Court of Session should have been, to consider your Lordships' judgment as the step from whence they were to proceed in this cause; and that they were bound to proceed to apply your Lordships' judgment as your Lordships directed them. Undoubtedly, too, my Lords, they ought to have relieved Mr Davidson from the costs he had already paid. My Lords, I do not apprehend that the Court of Session, in this case, meant to disregard your Lordships' judgment: No such thing, I dare say, was intended by them: They considered, that what had taken place previous to the appeal before your Lordships' House, and which they supposed was not known to your Lordships at the time that appeal was heard, (whether it was or not, does not distinctly appear)—they considered, if it had been known, it would have prevented the appellants having relief at your Lordships' Bar; and that therefore they should prevent the appellant having the benefit of the judgment pronounced posterior to that judgment. It appears to me, the Court of Session have taken an erroneous view of your Lordships' judgment; and that, in this case, the appellant must be relieved from the interlocutors they have pronounced; and the case, if there is to be further litigation between the parties, must go back to the Court of Session, in order that those inquiries may be instituted which your Lordships have positively directed. I shall therefore, my Lords, take the liberty of proposing to your Lordships a judgment to that effect, taking time to consider the form of the judgment to be pronounced. It appears to me your Lordships will find, that the Court of Session ought to have applied your Lordships' judgment, by which the former interlocutor of the Court of Session was reversed; and that the cause being remitted to the Court of Session, the appellant was entitled to repetition of the costs incurred by him; and that your Lordships should therefore reverse these interlocutors, and remit the cause to the Court of Session to proceed according to the principles of the judgment of 4th of July 1815, if the parties shall further litigate this question after

they hear what your Lordships' judgment will be in the next appeal; for I am sorry to say, that, in consequence of this proceeding in the Court of Session, a second appeal has been brought before your Lordships' House; and a third appeal, which has not been heard, which I understand it was not wished should be heard, if the judgment of this House on the second appeal should be favourable to the appellant. June 15, 1894.

My Lords,—In the second appeal it appears, that in consequence of this process of reduction brought by Mason, Baird and Company, to reduce this bill of exchange, putting a difficulty in the way of Davidson, Davidson, finding the difficulty thus interposed to his claim upon the bill, thought it right to call a meeting of the creditors of Mason, Baird and Company, in order for them to determine whether they would resist this action of reduction reductive, in order to get rid of this decret, which it was supposed by the Court of Session stood in his way. In consequence of that, my Lords, a meeting of creditors was called, and took place on the 15th of June 1818. It appears from the minutes of this meeting, that the creditors recommended and authorized the trustee to withdraw any further opposition to the action of reduction reductive sued against him by Mr Davidson, and to rank him upon the estate for the amount of that bill to which I am about to call your Lordships' attention. There had been a meeting of creditors, which had not been regularly convened, for the purpose of considering this question; and therefore, when the matter came before the Lord Ordinary, he directed informations to the Court on the cause, which were accordingly lodged for the parties; on considering which, the First Division of the Court pronounced that the trustee should call another regular meeting of the creditors to consider the matters at issue, upon due notification given of the purpose for which it was to be held. They considered, that with respect to the previous meeting there had not been that notification given of one of the purposes, or at least one of the subjects, which was a matter of consideration at that meeting, which ought to have been given; and therefore they directed that there should be another regular meeting of the creditors called, to consider the matters at issue, upon due notification given of the purpose for which it was to be held. Now, my Lords, I call your Lordships' attention to this interlocutor, because, undoubtedly, the inference from that interlocutor is, that, in their opinion, the subject-matter to be discussed at this meeting was a proper matter for the creditors, and on which they had a right to decide. (His Lordship then read it).

My Lords,—In consequence of this interlocutor another meeting was held, on the 2d of July 1819, of the creditors of Mason, Baird and Company, whose trustee, as I have stated to your Lordships, was the pursuer in this action of reduction; and at that meeting, by a majority of creditors present, it was agreed, that the resolutions of the former meeting of creditors, held on the 15th of June 1818, agreeing to with-

June 15. 1894.

draw any farther opposition to the action of reduction reductive at Mr Davidson's instance, should be adhered to, My Lords, the result, therefore, of the opinion of the creditors, supposing that was properly collected, was, that no further opposition should be made to Mr Davidson in reducing the judgment in the action of reduction; and the consequence would be, if no further opposition was offered to that proceeding, that judgment in the action of reduction, which stood in the way of Mr Davidson in the view of the Court of Session, would be removed. However, my Lords, against this resolution a petition and complaint, in the name and on behalf of the respondents, was presented to Lord Glenlee, Ordinary officiating on the Bills, 'praying for a warrant of service on the creditors who supported the resolution; and thereafter, on advising the complaint, with or without answers, to find, that the proceedings of the meeting have been irregular, void and null; and that the pretended resolution to abandon the decree of reduction, and to offer no further opposition to the action of reduction reductive, is ultra vires of the persons joining in and supporting the same, and is not binding on the petitioners, or the creditors at large, but is radically null and void; and that the trustee is bound to go on with the case; at all events, that the petitioners, who are willing to do so at their own expense, are entitled to an assignment to the debt and diligence on that condition; or to do otherwise, and give the petitioner such other relief in the premises, as to his Lordship should seem fit.' It appears, that on advising this petition and complaint, on the 31st July 1819, Lord Glenlee pronounced an order for service.

My Lords,—Answers to this petition and complaint were lodged for the appellant; and, on advising these pleadings, Lord Robertson, Ordinary officiating on the Bills, by an interlocutor of the 26th of October 1819, appointed the parties to print the petition and answers, and box the same for the Lords of the First Division. This order having been complied with, the cause came to be advised, when the Court, on the 18th November 1819, pronounced the following interlocutor:—'The Lords having advised this petition and complaint, with answers for Robert Davidson, they sustain the petition and complaint; find the proceedings of the meeting of creditors on the 2d day of July last are void and null, and cannot set aside, or otherwise affect the interest of Messrs Lockwood and Company, the petitioners in the decree of reduction presently depending in Court, and decern: Find the respondent liable in expenses of process; allow an account to be put in, and remit to the auditor of Court to tax the same.' Against this interlocutor the appellant has appealed to your Lordships, conceiving that the Court of Session in this case have come to a very wrong conclusion.

My Lords,—Great objections were made at your Lordships' Bar, and made below, to the regularity of proceedings at this meeting, on the ground of some persons voting on one side, and others on the

other, who were interested in the question, and who therefore ought not to be permitted to vote. My Lords, attending to the objections made, it appears to me, that even if the objections were sustained on the part of the respondents, still there would be a sufficient majority of the creditors voting upon that occasion, to justify the resolution arrived at by those creditors. The principal question was, whether, supposing that to be the case the resolution come to was one justified by the Bankrupt Act, enabling the creditors at their meeting to determine matters relative to the bankrupt estate. My Lords, by the 54th George III. cap. 197. the Act regulating sequestrations for Scotland, it is declared, that 'all resolutions of the creditors at their general meetings shall be final and conclusive, unless objected to and complained of, by a petition to the Court of Session, within thirty days after the meeting.' Mr Bell, in his Book on the Bankrupt Laws, states, that by the practice under this statute in Scotland, 'in electing the factor, trustee, and commissioners, in giving directions relative to the management, disposal, and recovery of the estate, in all ordinary resolutions of the assembled creditors, and even in the removal of the trustee at a meeting called for the purpose, a majority in value or extent of debt is decisive of the question with respect to the disposing and management of the estate.' Now, my Lords, undoubtedly it was a material question for those creditors, whether or not they should continue this litigation in the action reductive, or whether it was not for the benefit of the estate that that action should not be continued on behalf of the creditors; but that under all the circumstances they should abandon the action as far as the trustee was concerned, and enable Mr Davidson in that action to obtain a reduction of the former judgment. It appears to me, that under the Bankrupt Act this was a question which it was clearly competent for the creditors to decide, and the Court itself had directed this meeting. Their former interlocutor certainly shews, that, in their judgment, it was a matter competent for the creditors to decide. They thought it had not been regularly decided at the first meeting, and therefore, in order that the creditors might have a due notification of what they were called upon to decide, they directed that another meeting should be regularly convened for the purpose. That meeting was regularly convened; a large body of creditors were present; they differed in opinion; it was put to the vote, and as I have already stated to your Lordships, (it is unnecessary to go through the particulars, but it is quite clear), that the majority of the creditors were in favour of this resolution, supposing the parties interested on both sides are put out of the question. If there were some parties interested in the decision of the question one way, there were undoubtedly parties who voted who were interested in the decision in the other; but even if these parties were struck out of the list, there would still be a majority of the creditors in favour of the decision which was arrived at. Then, my Lords, was this a matter which was within the

June 15. 1824.



June 15. 1824. jurisdiction of those creditors to determine? It appears to me this was a matter respecting the estate of the bankrupts, which it was competent for them to decide upon; and consequently, if so, that the resolution they came to, so far as regarded the trustee, was a resolution which it was competent for them to make.

My Lords,—I observe in the petition below, the petitioners ask in the alternative, either that this resolution may be set aside altogether, or that the petitioners may be entitled to an assignment to the debt, they being willing to do either the one or the other at their own expense. My Lords, whether they are so entitled or not it is not necessary for your Lordships to decide in this case; for all your Lordships are called upon to decide here is, Whether or not it was competent for the creditors to abandon the defence of the action of the reduction reductive, and to authorize the trustee to abandon that action, and to enable Mr Davidson to set aside the former judgment? that is the point your Lordships come to decide upon this appeal:—the question merely is, Whether or not that decision of the creditors was a decision which was within their power to make, as binding on all the creditors of the sequestrated estate of Mason, Baird and Company? for if so, the Court of Session undoubtedly have done wrong in adjudging it to be null and void, which they have done:—they have adjudged that the proceedings of the meeting of creditors on the 2d of July 1819 are void and null, and cannot set aside or affect the interests of Messrs Lockwood and Company in the decree of reduction then depending in Court. My Lords, whether they have decided that this was null and void, on the ground that it was ultra vires of the creditors; or whether they have decided it on the ground that the creditors who voted at the meeting were not properly entitled to vote, I do not know; but if it was upon either of those grounds, with submission to the Court of Session, it appears to me they have not come to a right conclusion;—it appears to me it was clearly within their competence to decide upon that question, and that the decision was come to by a majority of creditors entitled to vote at that meeting. If so, your Lordships cannot sustain these interlocutors. I understood at the time the case was argued at your Lordships' Bar, that if the judgment in this case was in favour of the appellant, your Lordships would not be troubled with the third appeal; and I have some hope, that, after the litigation between these parties, the judgment now pronounced in the first appeal, directing the Court of Session to obey the judgment of your Lordships on the former occasion, and declaring that Mr Davidson must at all events have a repetition of the costs taken from him, and that the action of reduction is no longer to be opposed, will settle the matters in dispute between these parties, and that your Lordships will really not be troubled with the third appeal, but that an end will be put to this litigation, which has continued a great many years, and must have been productive of great expense to the parties on both sides. Your Lordships of course have no controul over that; all that your Lordships can do with

it is to decide upon the points which are presented to you. I shall humbly move your Lordships to come to some special findings on the first appeal; and shall move your Lordships also to direct that the interlocutors in the second appeal be generally reversed; and if so, that will establish the validity of the resolution of the creditors at that meeting; and then, as I have already said, my Lords, I trust, at least I confidently hope, this will put an end to the litigation, which has continued so long to the vexation of these parties.

J. DUTHIE—

FRASER,—Solicitors.

(Ap. Ca. No. 61.)

ROBERT BROWN, Junior, Appellant.—*More.*

No. 47.

WILLIAM MAXWELL and Others, Trustees of Alexander Campbell and James Campbell, Respondents.—*Adam—Ivory.*

*Insurance.*—An insurance having been made on goods to be exported from Leith to Gottenburgh, (at a time when Sweden was at peace with Britain, but when the importation of British goods was prohibited), with power to carry simulated papers, and any flag whatever; and the vessel having sailed on the voyage, but having been captured by a British ship under a mistake, and brought back to Leith; and having afterwards been released; and having, after war was known to have been declared by Sweden against Britain, again sailed to Gottenburgh; and having been captured by the Danes, and, together with the goods, condemned;—Held, (reversing the judgment of the Court of Session), That the underwriters were liable.

In the month of November 1810, the appellant, Robert Brown, junior, a merchant in Glasgow, was desirous to export a quantity of sugar from Leith to Gottenburgh. At this time Britain was engaged in a most active war with France, and Buonaparte had established the continental system with the view of excluding the goods of British merchants from the continent of Europe. In consequence of this, British merchants had recourse to simulated papers, in order to get their goods landed on the continent and sold; and the British Government was in the practice of granting licenses which protected them against seizure by the British cruizers.\* Sweden at this time stood in a position of neutrality,

June 15. 1824.

2D DIVISION.  
Lord Pitmilley.

\* The history and origin of these simulated papers were thus explained by the appellant in one of his pleadings to the Court of Session:—'Certain Frenchmen, who had emigrated to America, and who were well acquainted with the forms of clearances used in the American custom-houses, and with the form of what was called a certificate of origin, (being a document introduced by the French authorities for the pur-

June 15. 1804. but had entered into a treaty with Buonaparte, in consequence of which King Charles XIII. issued a proclamation, commanding  
 ‘ that from and after the 24th April next no goods shall be im-  
 ‘ ported, neither on paying the duties nor on transits, that belong  
 ‘ to his majesty the King of Great Britain and Ireland, his colonies,  
 ‘ or countries under the influence of the British Government, nor  
 ‘ goods of any description whatsoever, loaded in vessels from  
 ‘ Great Britain or any of her dependencies, be admitted into our  
 ‘ ports; and that all vessels, under whatsoever flag, that shall be  
 ‘ proved to carry such goods, and are not furnished with certi-  
 ‘ ficates and documents to certify the origin and full particulars of  
 ‘ their cargoes from their ports of loading, shall, when they arrive  
 ‘ in our harbours, be ordered off; save and except such vessels  
 ‘ as are solely loaded with salt, the importation of which, from  
 ‘ all foreign countries, we permit, in vessels not belonging to His  
 ‘ Britannic Majesty or his subjects.’ It therefore became neces-  
 sary that Brown should adopt measures for evading the effect of  
 this proclamation; and with that view he chartered the foreign  
 ship *Maria Francisca*, commanded and manned by a foreign cap-  
 tain and crew; and obtained a license from the British Govern-  
 ment, authorizing him, for the period of four months, to export  
 his goods to any port of Sweden, Denmark, or the Baltic. The  
 sugars were then put on board the vessel, and were accompanied  
 by simulated papers, which represented her as an American ship,  
 sailing from an American port, and the goods as belonging to an  
 American,—America being at peace with Sweden and the other  
 European powers. He then, on the 2d of November 1810,  
 entered into a policy of insurance with several underwriters in  
 London, Leith, Glasgow, and other places, by which, in con-  
 sideration of a premium of 12 guineas per cent, to return 2 per  
 cent for sailing with convoy, they insured the goods to the extent  
 of L.1550, ‘ at and from Leith to Gottenburgh, with liberty to  
 ‘ seek and join convoy, and to carry simulated papers and British

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‘ pose of accompanying cargoes of their own colonial produce), suggested an expedient  
 ‘ to the British merchants, by which the effects of the decrees above-mentioned might  
 ‘ be defeated, and British colonial produce introduced into the prohibited ports.—  
 ‘ The expedient suggested by the French emigrants was this:—They proposed, that  
 ‘ vessels sailing with colonial produce from the ports of Great Britain should be man-  
 ‘ ned by foreigners, and should be documented with papers, which they engaged to fab-  
 ‘ ricate, purporting that they had cleared out from America, and were carrying French  
 ‘ colonial produce. The great skill with which these emigrants were able to forge the  
 ‘ signatures, and to imitate the seals of the officers whom they thus personated, enabled  
 ‘ many a neutral ship to assume the appearance of having cleared out from a port in  
 ‘ America, though she actually sailed from Great Britain.’

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'license, and to sail under any flag;' the insurance to continue until 'the goods and merchandise whatsoever shall be arrived at Gottenburgh, and until the same be there discharged and safely landed; and it shall be lawful for the said ship, &c. in this voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever, without prejudice to this insurance.' And further, the underwriters agreed, 'in case of loss, capture, seizure, or detention by any power whatever, or any cause whatever, to pay a loss within two months after receipt of advice by the assured, by a bill at four months, without waiting for official documents.'

On the 15th of November the *Maria Francisca* sailed from Leith on her voyage to Gottenburgh along with other vessels, under convoy of the *Childers*, a British sloop of war. She was, however, separated from the *Childers* in a storm; and after obtaining convoy under another British ship, the *Gluckstadt*, she was deprived of her protection by another storm in the course of the night, and was boarded by the British gun-brig *Bold*. The officer of this vessel, on coming aboard, conceived that the *Maria* was a Dane, and therefore addressed the master in the Danish language; and the master, supposing that the *Bold* was a Danish ship of war, acted upon that footing, and concealed his British license, in consequence of which she was captured and carried into Leith, where she arrived on the 31st of December. It was not alleged that there was any blame attachable to either party for this seizure.

In the meanwhile, Bernadotte had been elected Crown Prince of Sweden, and on the 12th of November war was declared against Britain, and a proclamation was issued prohibiting all British vessels from entering any of the Swedish ports, and 'all importation into the kingdom of such goods, or colonial goods, of whatever origin the same may be, or under whatever flag they may arrive, under pain of confiscation.' Although the declaration and proclamation were issued prior to the sailing of the *Maria*, yet they were not known in Britain, nor for several days after she had been sent into Leith by the *Bold*. On her arrival there, the appellant intimated to the underwriters, that as the *Maria* had been seized, he held the condition of the policy to have come into existence, and therefore abandoned the cargo to them, and demanded payment of the loss. To this, however, they would not accede, but insisted that the voyage should be prosecuted. After some delay the *Maria* was released, and the appellant having obtained a new license, she

June 15, 1824. again sailed from Leith on the 15th of April 1811, under convoy of the British gun-brig Archer, and three days thereafter the appellant notified this to the underwriters. By the appellant it was stated, that the declaration of war, instead of increasing the risk, had rather diminished it; that after that event premiums fell 50 per cent, and that if the underwriters had agreed to vacate the policies, (which he wished them to do), he could have insured the cargo at this diminished rate.

The ship still carried the same simulated papers as formerly, and after accompanying the convoy for some time, she was separated from it on the 23d of April in a gale of wind near Shetland, and was then captured by the Danish privateer Klempaa, and carried into Bergen, where the simulation of the papers having been detected, both the ship and cargo were condemned. Several of the underwriters immediately settled in terms of the policies; but the respondents, alleging that the second sailing constituted a new voyage, and that the declaration of war created a new risk, maintained that they were not liable for the loss.

The appellant then brought an action against them before the Admiralty Court, and on the 17th February 1814 the Judge-Admiral (Murray) pronounced this interlocutor:—‘ Finds, that a cargo of sugars on board the Maria Francisca was, by policy of insurance dated the 17th November 1810, insured at the value of L. 2300 sterling to the pursuer by the defenders, at and from Leith to Gottenburgh, until the safe landing of the sugars, with liberty to seek and join convoy, and carry simulated papers and British license, and to sail under any flag; and the underwriters likewise agreed, in case of loss, capture, seizure, or detention, by any power whatever, or any cause whatever, to pay a loss, within two months after receipt of advice by the insured, by bills at four months, without waiting for official documents; and the premium was twelve guineas per cent, to return two pounds per cent for sailing with convoy and arrival: Finds, that in November 1810 the Maria Francisca, with a British license and simulated American papers, sailed from Leith with the sugars on said voyage, under convoy of the sloop of war Childers; from which having been separated in a storm, she afterwards found convoy under the Gluckstadt, from which she was also separated in the night; and having been captured by the gun-brig Bold, was brought to Leith Roads, where she was some time afterwards restored to her owners; and that her being thus brought to Leith Roads was innocently occasioned by her captain having been afraid to shew his

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' British license to the officer of the Bold, who came on board, owing to his suspecting him from his language to be a Dane, and, having thus concealed his license, was considered a lawful prize; and therefore finds, that this in no way annulled the policy: Finds, that in winter 1810-11 war was declared between Sweden and Great Britain, but that this made no difference on the insurance made on the said vessel; because British colonial property having been long before prohibited to be imported into Sweden, the sugars insured were to be covered by simulated American papers, with a British license; and as the property was understood, by both underwriters and insured, to be covered as apparently American, a declaration of war by Sweden against Great Britain made no difference on the risk;—and, 2dly, The declaration of war made no change in the real existing relations between Sweden and Britain, not only as præmia of insurance rather fell than rose after the declaration of war, but as Government allowed fleets to sail from the ports of Britain to Gottenburgh with British licenses, and under convoys, in precisely the same way after the war as before it was declared: Finds this latter fact fully proved by a certificate by John Wilson Croker, Secretary to the Board of Admiralty of Great Britain, dated 29th November 1813, and which also ascertains that the said Maria Francisca sailed again from Leith on the 15th of April 1811, under convoy of his Majesty's gun-brig Archer, commanded by Lieutenant James Lindsay Carnegie, for Gottenburgh in Sweden, and on all hands it is admitted, that the same cargo of sugar was on board: Finds, that the Maria Francisca, with the said sugars on board, was captured on said voyage by the Danes, and carried into Bergen, where she and her cargo were condemned as lawful prize of the captors; and, therefore, repels the defences. The respondents having presented a petition, the Judge-Admiral refused it, and at the same time issued this note:—' That the Maria Francisca actually sailed for Gottenburgh, is proved by official documents. It is therefore asserted, contrary to evidence, that she did not sail for that port. It is believed, too, that after she sailed the underwriters got notice of her having sailed. They did not then declare the policy null. If they had done so, a new one might have been made, leaving open the question of premium due. They took their chance of the vessel performing her voyage, and, when lost, they refuse to indemnify the owners.' The respondents then brought the case under the review of the Court of Session by a suspension, and

June 15. 1824. after some proceedings before Lord Pitmilley, his Lordship remitted it to the Jury Court with a view to the preparation of issues. The case, however, was returned to his Lordship accompanied by a report from the clerk, stating, that the following points of law required to be settled in the first place:— 1<sup>st</sup>, ‘Whether the second sailing was the voyage insured by the policy? 2<sup>dly</sup>, Whether, if it was not, the policy could be extended by the verbal agreement, or by the mere understanding of the parties, as alleged by the charger?’ And it was added, ‘If, in point of law, the voyage was ended by the detention, and could not be continued by verbal agreement, there is no question of fact to try. If otherwise, then a special verdict upon the general issues would raise the question to be decided by the Court of Session with greater certainty than any attempt to attain that end by special issues previously settled. The strong probability being, that some omission in the issues might leave the question untried, and so render the proceeding abortive.’ After hearing parties on these points, his Lordship pronounced this interlocutor:— ‘Finds, with reference to the first point above stated, that long after the Swedish proclamation of April 1810, prohibiting the introduction of British colonial produce into Sweden, the policy of insurance mentioned in the pleadings having been entered into, and the *Maria Francisca* having sailed on the 15th of November 1810, with a British license, and with simulated papers, on the voyage insured, she was, in the night betwixt the 5th and 6th of December 1810, after she had proceeded as far as the Scaw, taken possession of by the gun-brig *Bold*, and was brought back to Leith on the 31st of December; and finds, that according to the charger’s account of the facts, this seizure and detention of the ship happened without any fault on the part of the master: Finds, that on the supposition of the master not having been to blame, with regard to the seizure of the vessel and her return to Leith, the circumstance of her having been so seized and sent back formed no legal bar to her afterwards prosecuting the voyage insured, any more than would have been the case if the ship had been detained, and had been driven into any other port by bad weather or other accident: Finds, that neither did the fact of the owners having intimated an intention to abandon the cargo to the insurers after the vessel had been forced back to Leith, and which fact is proved by the letter of 10th January 1811, form any legal bar to the vessel afterwards proceeding on the voyage insured, when the owners learned that the insurers were

not disposed to acknowledge their right to abandon: That although the vessel remained in the port of Leith from the 31st of December 1810 till the 15th of April 1811, when she sailed under convoy for Gottenburgh, yet the fact of this long detention of the ship at Leith could not prevent the owners from prosecuting the voyage insured, it being proved that she had no opportunity, after she was brought back to Leith, of sailing with convoy earlier than the 15th of April: That the declaration of war between this country and Sweden during the time when the ship lay at Leith, after she had been brought back by the Bold gun-brig, and the fact of the owners of the goods insured and the master of the ship being in the knowledge of war having been declared between the two states, formed no legal bar to the *Maria Francisca* proceeding on her voyage, seeing that on this occasion she sailed with a British license, and with convoy, bound for the port of Gottenburgh, as is proved by the certificate of the Secretary of the Admiralty: Therefore, on the whole, with reference to the first point, finds, that the second sailing must be held to be a continuation of the voyage insured by the policy, and which was begun on the 15th of November 1810; and that if the insurers are to continue to contest this point, it will be incumbent on them to undertake to prove that the seizure and detention of the ship by the Bold gun-brig happened through the fault of the master of the *Maria Francisca*, or that the detention at Leith, from the 31st of December 1810 to the 15th of April 1811, was owing to his fault, or that of the owners: That the above findings render it unnecessary to pronounce any decision on the second point of law, which is stated in the report of the clerk of the Jury Court; and appoints the parties to enrol the cause, in order that the suspenders may state whether they will undertake to establish, by evidence, the matters of fact above referred to, viz. that the seizure and detention of the ship by the gun-brig Bold was occasioned by the fault of the master of the *Maria Francisca*, or that the detention at Leith, from the 31st of December 1810 to the 15th of April 1811, was owing to his fault, or that of the owners.' The respondents having declined to undertake a proof of these facts, his Lordship repelled the reasons of suspension, and found the letters orderly proceeded. The respondents then reclaimed to the Inner-House, and their Lordships, after ordering a condescendence of the facts they aver and offer to prove tending to establish the change of the voyage, and alteration of risk,

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June 15. 1824. 'alleged, to have occurred in this case,' altered the interlocutor, and suspended the letters simpliciter, but found no expenses due; and, on advising a petition for the appellant, they adhered to this interlocutor, 14th May 1822, 'in respect that the petitioner does not distinctly offer to prove any consent on the part of the underwriters, before the vessel sailed from Leith on the 15th April 1811, to hold the voyage covered by the policy.\*'

Against these judgments of the Inner-House, the appellant entered an appeal to the House of Lords, and contended that they were erroneous,—

1. Because the vessel and cargo were lost in the prosecution of the original voyage, and by one of the risks expressly insured against by the respondents and the other underwriters. In support of this proposition he maintained, that there had been only one, and not two voyages; that the voyage commenced when the vessel sailed in November from Leith; and that the circumstance of her having been detained and carried back to Leith by the *Bold*, was no more a termination of the voyage than if she had been sent into any other port, or as if she had been driven back by stress of weather: That if so, then the circumstance of war having been declared subsequent to her first sailing, could not deprive the appellant of the benefit of the policy, because, had it not been for the detention by the *Bold*, she would have proceeded on the voyage; and it was not alleged, that if, in the course of it, or on arrival at Gottenburgh, she had been seized and condemned, the underwriters would have been liberated. It was true, that before resuming the voyage in the month of April, a new license had been obtained; but this was necessary, both because the period of the first one had expired, and because, as Sweden was now a hostile power, it was requisite that the British Government should permit the trade to be carried on with the enemy. But this, so far from being prejudicial to the underwriters, was beneficial to them, seeing that without such a license she would have been liable to be seized by any British ship of war, and condemned for carrying on trade with the enemy, so that the risk was thereby diminished.

2. Because the declaration of war between Sweden and Great Britain, in point of fact, produced no difference in the risk of trading between the two countries from that which had pre-

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\* See 1. Shaw and Ballantine, No. 462; and Fac. Coll. No. 173; where the opinions of the Judges are given at full length; and from which it appears that all the Judges concurred in the interlocutor except Lord Craig.

viously existed; and, on the contrary, the importation of colonial produce, by means of simulated papers, was so much winked at by the Swedish Government after the declaration of war, that the risk actually was diminished, and insurances between Leith and Gottenburgh fell so low as two guineas per cent; so that the declaration was no addition to the risk, even supposing the respondents could relevantly found upon it.

3. Because, as the vessel was to sail under simulated papers, and from these papers she appeared to be an American carrying an American cargo, and the respondents had become bound to insure her safe arrival at Gottenburgh in that character, they truly came under an obligation of insurance, not upon a British ship or cargo, but on an American one; and therefore the declaration of war between Sweden and Britain could no more affect such an insurance, than if war had been declared between France and Turkey. And,

4. Because, as the vessel was condemned in respect of carrying simulated papers, and there was a special contract that she should safely sail under these simulated papers, and that she should not be affected by any laws or regulations proceeding from the British or Swedish Governments during the existence of the voyage, the respondents were liable under the policy.

By the respondents, on the other hand, it was maintained,—

1. That at the period of the insurance, and when the vessel sailed in November, Britain and Sweden were at peace with each other; and the proclamation issued by the latter country declared, not that the ships carrying British goods should be confiscated, but only that they should 'be ordered off,' so that there was no danger of confiscation; and consequently, the risk which was undertaken was very different from that which must exist in a time of war: That before the second sailing, the appellant was perfectly aware of the declaration of war, and consequently, that the Swedish ships were anxiously searching the seas for vessels carrying British goods; but nevertheless the appellant, without entering into any new agreement with the respondents, sent off the vessel under this great change of circumstances; and therefore this must be held to have been a new voyage, and a new risk: That it was true that a new license had been obtained; but although this might protect the appellant from the pains of law for trading with an enemy, yet it could not affect the rights of the respondents.

2. That the declaration of war had further a most material effect upon the contract, because it was no longer possible to

June 15, 1894. approach the port of Gottenburgh: That the terminus ad quem of the voyage sailed upon was different from that of the voyage described in the policy; and accordingly it was proved, by a correspondence between the appellant and his agents at Gottenburgh, after the return of the ship to Leith, that as the importation of all colonial produce was prohibited, the only way in which it could be landed was, by hovering off the coast, and smuggling it ashore by boats and lighters.

3. That it was no doubt true, that the respondents had permitted the vessel to carry simulated papers; but that permission only had the effect of putting it in the appellant's power to pass off his goods as neutral, and to expose them to that particular species of risk to which a discovery that they were truly British goods might render them liable at a time when the two countries were at peace; but the respondents did not insure that the goods should be dealt with in all respects as American. And,

4. That as the second voyage and risk were different, the policy thereby came to an end; and consequently, the respondents could not be liable for the capture of the ship by the Danes.

The House of Lords ordered and adjudged, that the interlocutors complained of be reversed, and that the reasons of suspension be repelled, and the letters be found orderly pronounced.

LORD GIFFORD.—My Lords, There is a case which was lately heard before your Lordships—of *Brown v. Maxwell*. This was an appeal to your Lordships' House against an interlocutor of the Court of Session, which had been heard before them, arising out of a policy of insurance dated so long ago as the year 1810, by which the appellant, Mr Brown, who had shipped on board a vessel called the *Maria Francisca* a quantity of sugar, had insured the goods on board that vessel on a voyage from Leith to Gottenburgh, with liberty to carry simulated papers and a British license. My Lords, it is well known to your Lordships, that at that time endeavours were made by the French Government to prevent the importation of English goods and colonial produce into the continent, and that, in consequence of that, vessels at that time obtained licenses from the British Government to carry simulated papers, in order to enable them, if possible, to carry colonial produce, particularly to Sweden; and in this case a license was obtained from the English Government for this vessel to carry simulated papers on the voyage. My Lords, after this insurance had been effected, the vessel, on the 15th of November 1810, sailed from Leith for Gottenburgh; but in the course of her voyage, before she had arrived at her port of destination, she was detained by an English vessel called the *Bold*, suspecting her to be a Danish ship, and was brought back

by that English cruiser to the port of Leith, from which she had previously departed. My Lords, in the interim a declaration of war had been issued by Sweden against this country in the latter end of the month of November 1810, three days before the vessel had sailed from Leith for Gottenburgh. In consequence of her being brought back to Leith, from the season, and other circumstances, she was detained there for a considerable time. She was unable to sail again from thence until the following April. In the mean time, and with a view to her second departure, she had obtained a fresh license for the voyage, the former license having expired. On her first coming back to Leith there was an intention on the part of the assured, the appellant in this case, to abandon the cargo to the underwriters; but they refused to accept the abandonment, and in consequence of that the vessel subsequently sailed again from Leith. My Lords, after the second departure, and in the course of the voyage, she was captured by the enemy. A claim was then made on the underwriters, which was resisted; and in consequence of that resistance proceedings were commenced in the Court of Admiralty in Scotland by the assured, the present appellant, to recover, against the present respondents, the sum of money they had underwritten. My Lords, it is not necessary to trouble your Lordships with the judgment pronounced by the Judge-Admiral—the result was in favour of the assured. The case was afterwards removed to the Court of Session; and the result of the decision of the Lords of Session was, that the underwriters had been exonerated from their liability in this policy; and it seems the principal ground on which the Court of Session have decided is, that the second departure from Leith was an entirely new voyage. They seem to have considered, and it was so argued at the Bar, that the voyage to Gottenburgh must be altered by the new situation of things between Great Britain and Sweden; and that, therefore, on the second departure from Leith, she did not sail on the voyage insured, and the underwriters are therefore freed. Another point was taken in the Court below, and argued at your Lordships' Bar, though not much relied upon, namely, that the situation of affairs between this country and Sweden, before her departure, being that of an actual war, that was such an alteration in the risk which the underwriters engaged to guarantee the assured against, that that was sufficient ground for exonerating the underwriters.

My Lords,—This case has been argued with great ability at your Lordships' Bar with reference to the law of Scotland, and with reference to the law of England; for the law of England upon this subject is undoubtedly the same as the law of Scotland: but, as your Lordships are aware, questions of this sort have been much more discussed in the courts of this country—there have been many more decisions in the courts of this country—and therefore reference has been made at the hearing to English cases upon this subject. My Lords, I apprehend that it has been established, and indeed must be so from the

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nature of the contract, that the mere increase of risk arising from circumstances over which the assured have no controul, and that were not in the contemplation of the parties at the time they entered into the contract, will not relieve the underwriters from the liability. The main question in this case is, Whether or not there was an abandonment of the original voyage from Leith to Gottenburgh? and whether, when she set out the second time, she set out with an intention of proceeding to Gottenburgh, or of proceeding to some other place not within the terms of the risk? My Lords, with respect to the mere circumstance of the vessel being brought back and detained at Leith by this overruling force; arising out of the conduct of the English ship the Bold, it is impossible to contend that that circumstance varied the voyage. Cases have been cited, *v. Borradaile* in the Common Pleas, and *Scott v. Thomson* in the King's Bench, which have decided, that circumstances like those which existed here are not sufficient to put an end to the policy; and therefore, when first she was brought back, and during her stay here, I think there is no question that she was covered by the policy. Indeed if, instead of being brought back here, she had been carried into any other port between Leith and Gottenburgh, and there detained, and had afterwards set out in prosecution of the original voyage, I apprehend no doubt can be entertained, that, having originally set out on the voyage insured, and having been detained in the way I have stated to your Lordships, and having then set out again a second time in the prosecution of her voyage, she would be considered as prosecuting the voyage originally intended.

But it has been argued at the Bar (not that there is any decisive evidence in this case) that the vessel had altered her destination; for that, from the circumstance of war having broken out, from the circumstance of Sweden having prohibited the entrance of all colonial articles into her ports, it is impossible that she could have it in her intention to go from Leith to Gottenburgh; and they rely in support of that view of the case on a letter which has been produced, dated 30th March 1811, which is a letter from Mr Brown, the appellant, to Messrs Carnegie and Company of Gottenburgh, the consignees of the cargo, in which he says, 'I shall instruct the captain to keep at a safe distance from the shore when he arrives, and inform you of his arrival.' In answer to that letter there was another from Messrs Carnegie and Company, which undoubtedly is no evidence in my view of the case; but in that letter they write as follows:—'We observe by your esteemed favour of the 30th ultimo, that you had resolved on letting the Maria Francisca proceed with the cargo, which we would not have advised; for though several cargoes have been straggled on shore from the vessels in the Roads, it has been attended with great expense and danger. The risk will be much more in summer than in winter, when the long nights favour such business; and Government are now adopting severe measures to crush this clandestine

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'trade.' Your Lordships will perceive the original voyage was, if I may use the expression, a smuggling voyage, because when the policy was underwritten it was impossible for a British ship to have gone to the port of Gottenburgh as a British vessel; the only chance she had was to carry simulated papers, affecting to belong to a different country, and affecting not to have brought the colonial produce from Great Britain. That was the original voyage contemplated by the policy: the risk was increased, most probably, by the declaration of war issued in the mean time by Sweden, and which issued during the progress of her original voyage from Leith to Sweden; and there was greater care taken to prevent the importation of colonial produce into Sweden; but they argue from these circumstances that it was impossible, under these circumstances, she could have intended to go to Gottenburgh.

My Lords,—I ought to state two propositions of law which were advanced, and which are not disputed in this country or Scotland:—That where a vessel sets out on a voyage insured, and an intention is formed to deviate from that voyage, but before the intention to deviate has been carried into execution, the vessel is taken, the policy is not affected. Where, however, she sails on a particular voyage, and that voyage has afterwards been changed, though in the second voyage she may set out on a route which would be the same route as far as she had proceeded to the original place of her destination, still, if the voyage be actually changed before she set out, the policy is gone: whereas, if she has an intention at a certain point to deviate from the voyage, but before she comes to the deviating point she is taken, the policy is still in force. Now the question is, Whether, before she set out the second time, this policy having attached,—for she had set out originally on her voyage to Gottenburgh,—whether when she set out the second time her intention was this—Get to Gottenburgh if you can, but if you cannot, you must remain off Gottenburgh, and dispose of your goods as well as you can? If that was her intention, but before she arrived at that place at which it was necessary to decide, she was taken, the case comes within those principles, that she had an intention, under certain circumstances, to deviate from the voyage insured, or not to complete the voyage insured, but that, before it was necessary to come to a determination, she was taken. Then it appears to me, that, consistently with all the authorities, that would not be sufficient to vitiate the policy. She had set out on the voyage insured; she had been unavoidably detained in Leith, still in the prosecution of her voyage, until she set out in April, when she still had the intention of prosecuting the voyage. She obtained a fresh license,—it is called a renewed license,—and she set out, as this license shews, to go to Gottenburgh. Undoubtedly if she had arrived near Gottenburgh, and finding the risk too great, attempted to unship her cargo into boats to smuggle them into Gottenburgh, that would have varied the case; but before she arrived at that point where it was necessary to decide what

June 15. 1824. should be done, she was actually taken. Then the question is, Whether she was in the prosecution of that voyage which was contemplated? The Judge-Admiral appears to be of that opinion; but the Court of Session undoubtedly seems to have thought that that was not the case. On the best attention I have been able to pay to this case, it appears to me that the Court of Session have come to a wrong conclusion, and therefore it will be my duty to move your Lordships that this interlocutor shall be reversed. I will not move your Lordships this morning, because it may be necessary to introduce some special findings.

My Lords,—We heard at your Lordships' Bar that this was a case in which the party had been kept out of his money so long, that it was proper, if your Lordships should think that the interlocutor should be reversed, that your Lordships should give interest on the money. Looking at the circumstances of this case, I do not think it is a case in which the Court ought to exercise that power, which undoubtedly it possesses, of adding the interest. I will take the liberty of handing to your Lordships in the course of this day, or to-morrow morning, the minutes of the judgment which I will move your Lordships to adopt in this case: the principle of it undoubtedly will be to reverse the judgment in the Court of Session, affirming by that the decision of the Judge-Admiral.

*Appellants' Authority.*—*Planch v. Fletcher*, 1. Douglas, 251.

*Respondents' Authorities.*—1. Park, 286. and Cases there; Marshall, 184. and 396.; 1. Bligh's Reports, 87.

J. RICHARDSON—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No. 62.*)

No. 48. MAGISTRATES OF LANARK, Appellants.—*Brougham*—*Robert Bell*.  
ROBERT HUTCHISON and Others, Respondents.—*Forsyth*—*Skene*.

*Process*—*Jury Court*.—A case having been remitted to the Jury Court by the Inner-House, and thereafter transmitted back to decide certain points of law;—Held, (affirming the judgment of the Court of Session), That it was competent, notwithstanding, to order the proof to be taken on commission.

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2D DIVISION.

IN the month of November 1821, Hutchison and others, Trades' Councillors of the burgh of Lanark, presented a petition and complaint to the Court of Session, complaining of the election of the Magistrates and Councillors of that burgh at Michaelmas 1821, on various grounds, and particularly, that an illegal compact had been entered into, and reduced to writing, by which the mem-

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bers of the Town-Council bound and obliged themselves 'to support one another in the Council, and the minority to fall in with the majority, and all voting with one another;' under which illegal compact the election had been made, but that the writing had been destroyed. After some procedure, and ordering condescendence and answers, the Court granted warrant against havers for recovery of the document, but this proved unsuccessful; and when the case again came before their Lordships, they pronounced an interlocutor, by which they found 'it expedient, that in this case, before answer, issues in fact shall be adjusted, and tried by a jury; and for that purpose remit the condescendence, and answers, and proceedings, to the Jury Court, to direct special issues of fact to be framed, and tried by a jury, and that the jury be directed by the Jury Court to find, and the Jury Court to indorse on their verdict, all such matters of fact as shall appear to be material to the proper decision of the cause.' The case was accordingly sent to the Jury Court; but in the course of preparing the issues it occurred, that there were certain questions of law which ought, in the first place, to be decided before going to trial; and particularly, whether it was competent to prove the terms of the document alleged to contain the illegal compact by the testimony of witnesses; or whether it was not essential that these should be established by a decree of proving the tenor. In consequence of these doubts a motion was made; and the Jury Court 'ordered, of consent, that this cause be transmitted to the Court of Session, to consider such questions of law and relevancy as ought to be decided previous to the trial.' Minutes having then been lodged by the parties, the Court, on the 25th of January 1823, pronounced this interlocutor: 'Recall the remit to the Jury Court; find no need of a formal proving of the tenor of the compact or agreement referred to; and before further answer, allow to the parties a conjunct probation, and grant commission, &c. for taking the same.' Against this judgment the appellants reclaimed, and contended, that the Court had no power to recall the remit to the Jury Court; that that remit was final; and as the case had only been sent back with the view of having points of law decided, it must of necessity return to the Jury Court immediately upon that being done. On the other hand, the respondents maintained, that as there was a broad and sweeping declaration in the Jury Court Act, 'that nothing in this Act contained shall extend, nor be construed to extend, to prevent the Court of Session, in either of its Divisions, or the Lords Ordi-



June 15. 1824. ' nary, (save and except in the cases concluding for damages here-  
' in before enumerated), or the Judge-Admiral, unless otherwise  
' instructed as aforesaid by the Court of Session, to take proof on  
' commission, by a remit or in presentia, and thereafter dispos-  
' ing of the cause in the manner now practised in such cases,' it  
was quite competent to the Court to order the proof to be taken  
on commission.

On advising the case, *Lord Glenlee* observed, that the expres-  
sion in the interlocutor, ' recall the remit to the Jury Court,'  
was unnecessary: That remit was exhausted; and the question  
is, whether, when the case has been sent back to this Court, there  
is any thing in the statute obliging us to re-transmit to the Jury  
Court. I see nothing to that effect in the statute.

*Lord Craigie* entertained much doubt as to the competency of  
ordering the proof on commission.

*Lord Justice-Clerk.*—There is nothing in the statute which  
prevents the Court from doing what it has done. There are no  
words prescribing the future course of proceeding after it has  
been transmitted from the Jury Court. It is no doubt said, that  
it shall be lawful to re-transmit the process; but there are no  
words compelling the Court to do so, or depriving it of the power  
at this stage of the cause, if it shall see expedient, to order the  
proof to be taken on commission. In this case it is highly ex-  
pedient that the proof should be so taken; and therefore I think  
the interlocutor should be adhered to, with a declaration that the  
expression recalling the remit was unnecessary.

*Lord Bannatyne.*—It does not appear to me that the Court is  
entitled to order the proof to be taken by commission, after it has  
been finally found that it was expedient that the case should be  
tried by a jury, and a remit made accordingly. This can only  
be altered by the Jury Court declaring the case unfit for trial by  
means of a jury.

*Lord Robertson.*—With the exception of the expression as to  
recalling the remit, I think the interlocutor right.

The Court, therefore, on the 17th May 1823, pronounced this  
judgment:—' Find, that the words in the interlocutor complained  
' of, " recall the remit to the Jury Court," were unnecessary; but  
' quoad ultra adhere to the interlocutor, and refuse the desire of the  
' petition, reserving entire all questions as to expenses hinc inde.\*'

The Magistrates having appealed, the House of Lords order-  
ed and adjudged, that the interlocutor of the 17th May 1823

\* 2. Shaw and Dunlop, No. 296.

'complained of be affirmed; and it is further ordered and ad- June 15. 1824.  
'judged, that so much of the interlocutor of the 25th January  
'1823, also complained of, as is adhered to by the said interlo-  
'cutor of the 17th May 1823, be also affirmed; and it is further  
'ordered, that the said appeal be dismissed.'

**LORD GIFFORD.**—My Lords, There was a case argued before your Lordships, the Provost, Magistrates, and Town-Council of the burgh of Lanark v. Hutchison and others, the question in which related to the construction of the two Acts of Parliament passed, introducing jury trials into Scotland. I will state to your Lordships the proceedings in the Court of Session; and will call your Lordships' attention to the Acts of Parliament on which this question turns.

**My Lords,**—In this case the respondents presented a petition and complaint to the Lords of the Second Division of the Court of Session in Scotland, founding upon the Acts 7. Geo. II. cap. 16. § 7-16.—Geo. II. cap. 2. & 14.—Geo. III. cap. 81. respecting the elections of Magistrates and Councillors of the royal burghs in Scotland, complaining of the election of Magistrates and Councillors for the burgh of Lanark, at the term of Michaelmas 1821, upon various grounds. The first of these consisted of a statement, 'that certain of the appellants  
'had entered into an engagement to stand by and support their joint  
'influence and interest, for the purpose of keeping each other in the  
'Council. With that view they undertook to vote with one another;  
'and that, in entering into this illegal compact, the parties alluded to  
'had no great confidence in each other. They did not dare trust to  
'mere verbal engagements, or solemn promises, but held it necessary  
'to reduce into writing the conditions of their conspiracy. An obliga-  
'tion was regularly reduced into writing, and subscribed by those  
'members of Council, engaging to support and vote for each other,  
'and to keep each other in office.'

**My Lords,**—In the course of the proceedings upon this petition and complaint, the Court of Session, on the 12th of June 1822, pronounced an interlocutor, by which they granted warrant for letters of incident diligence at the instance of the complainers against havers, for recovering the writing or memorandum described and referred to in the pleadings.

**My Lords,**—In pursuance of this interlocutor, several persons were examined as havers, all of whom were among the appellants; and the consequence was, that the pursuers became satisfied that there was no writing in existence; and, on a subsequent day, July 6. 1822, the Second Division pronounced this interlocutor. (Here his Lordship read the interlocutor, p. 387.) Your Lordships will perceive by this judgment that the cause was remitted to the Jury Court; in order that issues might be framed there for the purpose of ascertaining the facts which were in dispute in this cause, and with liberty for them to indorse on

June 15. 1824. their verdict all such matters of fact as should appear to be material to the proper decision of the cause.

My Lords,—When the case came before the Clerks of the Jury Court, in order to settle those issues, it appeared that there was a question which it was thought ought to be previously decided in the Court of Session; and in consequence of that, on the 29th November 1822, a motion was made, which is stated to be by consent:—‘It is ordered, of consent, that this cause be transmitted to the Court of Session, to consider such questions of law and relevancy as ought to be decided previous to the trial.’ My Lords, in consequence of this transmission to the Court of Session, the Court of Session entertained the question of law, and, on hearing the case on January 25. 1823, the Court pronounced this interlocutor. (Here his Lordship read the interlocutor, p. 387). The appellants presented a petition against this interlocutor, and the Court, on advising that petition, pronounced this interlocutor on the 20th of May 1823:—‘The Lords having advised this petition, with answers thereto, find, that the words in the interlocutor complained of, “recall the remit to the Jury Court,” were unnecessary; but quoad ultra adhere to the interlocutor, and refuse the desire of the petition, reserving entire all questions as to expenses hinc inde.’

My Lords,—From these interlocutors an appeal is brought to your Lordships’ House, upon this ground, that it was not in the power of the Court of Session, having once remitted this cause to the Jury Court, afterwards, when the cause came back to them to decide those questions of law, to order a proof in the ordinary way, but that it was absolutely incumbent upon the Court of Session again to remit the cause to the Jury Court; and, my Lords, this depends on the Acts of Parliament for the trial by jury in civil cases in Scotland. The first is in the 55th year of his late Majesty’s reign. My Lords, when this new mode of trial in civil cases was introduced into Scotland, however much we may be wedded to jury trials in civil cases here, yet knowing that the Courts and the people of Scotland were not used to that form, it was introduced with great care and great caution when the Act passed, and it was left very much to the discretion of the Court to order a jury trial or not; but if a jury trial was ordered, it was then thought expedient, in particular cases, to prevent any appeal against such an order by the Court of Session; and therefore, by the 56th of the King, which introduced for the first time trial by jury in civil cases, it is enacted, ‘That it shall and may be lawful for either Division of the Court of Session, in all cases that may be brought before them during the continuance of this Act, wherein matters of fact are to be proved, to order and direct, by special interlocutor, such issues as may appear to them expedient for the due administration of justice to be sent to the said Court,’ in order to be tried by a jury; and that where the Lord Ordinary should see cause for issues to be directed to be tried by a jury, then he should take the cause verbally to report to the Division of the Court to

which he belonged, so that the Division might determine, whether the issue should be sent to the Court to be tried by a jury, or the cause to be disposed of as then practised. Then the third section enacts, 'That it shall and may be lawful for the Judge of the Admiralty to report, in writing, to either of the Divisions of the Court of Session,' and so on. And then by the fourth section it is enacted; 'That it shall not be competent, either by reclaiming petition or appeal to the House of Lords, to question any interlocutor granting or refusing such trial by jury.'

June 15. 1884.

My Lords,—The experiment under this Act having succeeded, another Act was passed in the 59th year of his late Majesty's reign, extending the power of the Jury Court, and introducing new enactments on the subject of issues, to be granted either by the Court of Session or the Lord Ordinary.

My Lords,—The first section of the 59th of the King directs, that in particular actions the process shall be sent by remit to the Jury Court; and then it enacts by the second section, 'That if it shall appear to the parties, or either of them, that there is a question of law or relevancy which ought to be decided previous to the remit of the cause to the Jury Court, it shall be competent for them to state the same orally to the Lord Ordinary.'

Then by the third section it enacts, that it shall be competent for the Lord Ordinary, if it shall appear to him that there is no question of law or relevancy which ought to be decided previous to the remit of the cause to the Jury Court, forthwith to order such cause to be remitted to the Court for the purpose aforesaid. 'Providing always, that it shall also be competent for the Lord Ordinary, if he sees cause, to reserve the alleged question of law for the consideration of the Court of Session, after the matters of fact shall have been found by a jury; and in all such cases the interlocutor of the Lord Ordinary ordering the cause to be remitted to the Jury Court, whether with or without a reservation of the alleged question of law, shall not be subject to review, by representation, petition, appeal to the House of Lords, or otherwise.'

Then, my Lords, the next section enacts, 'That it shall and may be lawful for the Lord Ordinary, in all cases other than the actions for damages herein before enumerated, when matters of fact are to be proved, to order the whole process and productions in the cause to be remitted to the Jury Court, without reporting to the Inner House; and the Jury Court is hereby authorized and required to settle an issue or issues, and try the same by a jury; and if it shall appear to the Lord Ordinary to be expedient for the due administration of justice, they may pronounce an interlocutor, pointing out the matters of fact which they require to be determined by a jury; and the Jury Court is hereby authorized and required to settle an issue or issues, in terms of such interlocutor, and such other issue or issues

June 15. 1824. 'as may arise out of the examination of the case by the Court, and to try the same by a jury in manner aforesaid.'

The next section is applied to cases in which issues are directed, or in which the process is remitted to the Jury Court by the Lord Ordinary; and then by the sixth section it is enacted, 'That it shall be lawful and competent for the Court of Session, in either of its Divisions, in all cases depending in the Inner-House in which matters of fact are to be found, if it shall appear to them expedient for the administration of justice, to order and direct, by special interlocutor, the whole process and productions to be remitted to the Jury Court, for the said Court to settle the issues, and to try the same by a jury as aforesaid; and if it shall appear to the said Divisions to be expedient for the due administration of justice, they may pronounce an interlocutor, pointing out the matter of fact which they require to be determined by a jury: and the said Jury Court is hereby authorized and required to settle issues in terms of such interlocutor; and the said Court may likewise settle such other issues as may arise out of the examination of the case by the said Court, and try all such issues by a jury in manner aforesaid.' This section, therefore, provides for an original remit, as in this case, by the Court of Session to the Jury Court; and your Lordships perceive it is not imperative upon the Court, but it is left entirely to their own discretion, and that it is competent for them in those cases to remit the question to the Jury Court.

Then, my Lords, by the twelfth section, upon which the question mainly turns in this case, it is enacted as follows: 'That it shall be competent and lawful for the Jury Court, when it appears to the said Court in the course of settling an issue or issues, or at any time before trial, in the cases remitted to them as aforesaid, that there is a question or questions of law or relevancy which ought to be previously decided, to remit back the whole process and productions to the Division of the Court of Session, the Lord Ordinary, or Judge-Admiral, who remitted the same to the Jury Court, that the question or questions of law or relevancy may be considered and determined there: Provided always, that it shall be lawful to the said Division, Lord Ordinary, or Judge-Admiral, when matters of fact shall, after such consideration or determination, remain to be proved, again to remit the whole process and all the productions to the Jury Court, in order that an issue or issues may be prepared and tried as aforesaid: Provided further, that it shall be competent to the said Division and Lords Ordinary to prepare and settle an issue or issues in manner aforesaid, for the purpose aforesaid; and it shall be competent for the Jury Court, when it appears to the said Court, in the course of settling an issue or issues, that a case turns upon matter of complicated accounts, or other matter to which trial by jury is not beneficially applicable, to remit back the whole process and productions as aforesaid, with their report thereon, in order that the Divi-

'sion, Lord Ordinary, or Judge-Admiral, may proceed with the same. June 12. 1871.  
'in such manner as shall appear to be most expedient for the adminis-  
'tration of justice.'

Now, my Lords, that is what has happened in this case. After the remit to the Jury Court, the Jury Court conceived, and it appears that the parties were all agreed in the fact, that there were some questions of law and relevancy, which it was fit the Court of Session should determine before the cause came back to the Court for issues to be settled, and for the trial of those said issues; and the consequence was, that the whole process and productions were remitted back to the Division of the Court of Session from which the cause had been originally sent to the Jury Court. Then, my Lords, when it came back to the Court of Session, they having decided the points of law, they by an interlocutor decided, that instead of sending the case back to the Jury Court, the question of fact which then remained to be decided between these parties would be better examined into by the old mode of examination, which had prevailed in Scotland before the introduction of the Jury Court. The question is, as I have already stated to your Lordships, Whether it was competent to the Court of Session, after being again in possession of this cause in this mode, to make a decision upon the case in this way, or whether they must remit the trial of the fact, which remained to be decided between these parties, to the Jury Court?

My Lords,—I ought to have stated to your Lordships, that by a subsequent section it was enacted, as it had been in the 55. of Geo. III. 'That it shall not be competent, by representation, reclaiming petition, bill of advocacy, appeal to the House of Lords, or otherwise, to bring under review any interlocutor by the said Divisions, Lords Ordinary, or the Judges of the Admiralty, ordering a trial by jury.' So that your Lordships perceive, if the case had rested with the Jury Court in the first instance, no appeal, no reclaiming petition, no mode whatever of reviewing the decision of the Court of Session, by which they had directed the cause to go to the Jury Court, could have been entertained. That would have been final. The parties never could have questioned it; but having been remitted, the question is, Whether having been remitted to the Jury Court, and then referred back to the Court of Session, the Court of Session had not the same jurisdiction over the cause as they had when they first directed it to be remitted there? And when I call your Lordships' attention to the subsequent part of the clause, I think you will see how anxiously the Legislature have made provision to enable the Court of Session, when a cause came back to them, to send the case back to the Jury Court; from whence your Lordships will see most clearly, that the Legislature intended that, when the Court of Session had possession of a cause, they should have possession of it to the full extent of directing what facts remained to be decided between the parties, to be ascertained either according to the old mode, or according to the new mode; for

June 15. 1834. it says, referring to the case having come back from the Jury Court, 'Providing always, that it shall be lawful to the said Division, Lord Ordinary, or Judge-Admiral, when matters of fact shall, after such consideration or determination, remain to be proved, again to remit the whole process and all the productions to the Jury Court, in order that an issue or issues may be prepared and tried as aforesaid.' So that it gives them the power, without which the Legislature seem to have doubted whether they would have the power when the cause was brought back to them,—it gives them the power, if they think fit to exercise it, to remit again to the Jury Court, in order that an issue or issues may be prepared and tried. It was not contended at your Lordships' Bar, that the original remit would have done after they had decided the questions of law. It is clear the cause could not have gone back under the original remit, but there must have been a new remit. The Court of Session have thought proper in this case not to make such new remit. And then it goes further, 'that it shall be competent to the said Division and Lords Ordinary to prepare and settle an issue or issues in manner foresaid;' so that when it comes back to the Jury Court, not only does the Act of Parliament give them the power to remit the cause back again, but it gives them the power, instead of sending the whole case to the Jury Court, to settle themselves the issues to be tried.

Then it enacts, 'That it shall be competent for the Jury Court, when it appears to the Court, in the course of settling an issue or issues, that a case turns upon matter of complicated accounts,' to remit the case back to the Division from whence it came. Then the next section, the thirteenth, is in these terms:—'Be it enacted, That nothing in this Act contained shall extend, or be construed to extend, to prevent the Court of Session, in either of its Divisions, or the Lord Ordinary, save and except in cases concluding for damages, herein before enumerated, or the Judge-Admiral, unless otherwise instructed as aforesaid by the Court of Session, to take proof on commission, by remit, or in presentia, and thereafter disposing of the cause in the manner now practised in such cases.' So that the Legislature was still more anxious, desirous as it was of introducing trial by jury where facts were disputed, at the same time not to force a trial by jury in the Courts of Scotland, but to leave to them to determine whether the case should be so examined or not. My Lords, it appears to me, therefore, that the Court of Session have done rightly in this case, in taking to themselves the power of deciding this question.

It has been argued, but not very strenuously, in this case, that if they had the power, it would not have been expedient they should exercise it. It would be difficult, my Lords, to decide upon that question. It has been argued by the respondents, and probably with some truth, that it was necessary not only to examine witnesses, but to do what the law of Scotland enables the Court of Session to do, namely, to

examine the adverse party himself; and that that was a circumstance which operated upon the minds of the Court, to direct, in this second instance, the ordinary mode of taking proof in the Courts of Scotland, instead of sending it to a jury. However, whether that may have been the operating motive in the mind of the Court of Session, it is not necessary for us to inquire. The question to be decided by your Lordships is, Whether they had the power in this case of so doing? My Lords, I must confess that it appears to me, from these Acts of Parliament, no reasonable doubt can be entertained that they had the power on the case being brought back to them; and that therefore these interlocutors must be affirmed. When I say these interlocutors must be affirmed, they have certainly been wrong in the words which they introduced into the first interlocutor, of recalling the remit. It appears to me very questionable whether they had the power of so doing; and in the second interlocutor they have found those words unnecessary; but as to the rest of the interlocutor, they adhere to it. The judgment I should propose, therefore, to your Lordships is, to affirm the last interlocutor, and so much of the first interlocutor appealed against as is adhered to in the last interlocutor: I would therefore move your Lordships, that this be the judgment of your Lordships.

*Appellants' Authorities.*—55. Geo. III. ch. 48. § 4.; 56. Geo. III. ch. 35. § 2, 3.  
12. 15.

*Respondents' Authorities.*—1. *Ersk.* 2. 7.; Buchanan, March 1754, (7347.); *Countess of Loudon*, May 28. 1798, (7398.); 59. Geo. III. ch. 85.; *Tenant and Company*, Jan. 15. 1822, (1. Shaw & Hall. No. 275).

J. RICHARDSON—SPOTTISWOODE and ROBERTSON,—Solicitors.

(*Ap. Ca. No. 63.*)

JOHN HAY and Others, Appellants.—*Lushington—Shadwell.* No. 49.

AUGUSTUS W. H. LE NEVE and Others, Respondents.—  
*Solicitor-General Wetherell.*

*Reparation—Collision of Ships.*—One ship having run down another, and this having been occasioned equally by the fault of both;—Held, (reversing the judgment of the Court of Session), That the owners of the ship which ran down the other were liable only for the one-half of her value, provided that did not exceed the value of their own ship.

THE brig Wells, belonging to the respondents, Le Neve and others, sailed from London on the 18th February 1814, having on board a cargo of logwood, bound for Leith; and on the 28th of that month she arrived in the Firth of Forth; and in conse-

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1st DIVISION.  
Lord Gillies.



June 15. 1894. quence of the wind and tide preventing her going farther up, she came to an anchor about three miles to the eastward of the island of Inch-Keith. This island stretches from north to south betwixt the coasts of Mid-Lothian and Fife, and is nearly equidistant from both. Leith Roads are to the south-west of the southernmost point of Inch-Keith; and in making for that roadstead vessels almost always bear up along the north or Fife coast, double the north point of Inch-Keith, and then, if the wind be fair, stretch directly to the south into Leith Roads. At the place where the Wells brought up the Firth is from eight to ten miles broad, and is in what is called the *fair-way*.

On the 24th of the same month, the smack *Sprightly*, belonging to the London and Edinburgh Shipping Company, (of which the appellants were the trustees), sailed from London with a general cargo for Leith. She entered the Firth of Forth about midnight of the 28th, at which time the wind was blowing strongly from the south-west, almost directly against her; a heavy sea was running; and the night was dark and rainy. The captain and the whole crew, with several passengers, were on deck during the night. In proceeding up the Firth, it appeared that the top-mast was struck, the mainsail double-reefed, and that in attempting to stay the vessel she missed stays. With the exception of one man, the crew were occupied in attending to the management of the vessel, and this man was placed towards the bow, (over which the sea broke), to keep a look-out; but he occasionally gave his assistance to the rest of the crew. In beating up against the wind the *Sprightly* stretched towards the north, and, with a view of tacking, came towards the south, being directly towards the point where the Wells was lying. This was at four o'clock in the morning. No light was aboard of the Wells, and being heavily laden she lay deep in the water, and had all her sails taken in. The only person on deck was the mate, who having perceived the approach of the *Sprightly* hailed her more than once, but no answer was returned; and when the vessels were within a short distance of each other, he heard an order given on board the *Sprightly*, 'Head a-weather, bear up, there's a ship riding;' and immediately the helm was put hard up. The *Sprightly* thereupon ran with her starboard bow against the starboard quarter of the Wells, carried away her main-boom and gaff, knocked away the companion, and stove in her starboard quarter. One of the hands jumped on board the *Sprightly*. The rest took to the boat, and the vessel almost immediately went to the bottom. The *Sprightly* continued to hover about in

search of those in the boat, who for some time, from the darkness, were unable to discover her, but at last they were taken aboard. June 15. 1824.

An action was then brought by the respondents against the appellants, concluding for damages, in which, after giving their own statement of the facts, they alleged, 'that had those on board the said smack Sprightly kept a proper look-out for ships at anchor, or had they used the proper means, after the said man on board of the Sprightly called out as aforesaid, they might have avoided the Wells, and said mischief would not have happened; and therefore the loss of the said ship and cargo, and all the damages thus occasioned to the owners of the Wells and her said cargo, is entirely imputable to negligence or improper conduct on the part of the master and crew of the said smack Sprightly.' This having been denied by the appellants, who alleged that the accident was imputable entirely to the Wells having anchored in the *fair-way* without hanging out a light; and that besides she was so insufficiently anchored that she was actually drifting when the vessels came in contact; and therefore they could not be liable in damages.

The Judge-Admiral (Murray) ordered each party to lodge a condescendence, and thereafter allowed a proof, requiring the appellants 'to bring a correct proof of the precise hour when the collision happened, the state of the light at the time, and the distance which intervened between the Sprightly and the Wells when the latter was first discovered.' And thereafter he found 'it admitted by the pursuers, that they had no light in the binnacle of the Wells, the reason of which is accounted for; but allowed the defenders to prove, if they can, that it was the duty of those on board that vessel, and that it is customary so to do, viz. to shew a light when they see a vessel in danger of running foul of them through scarcity of light to observe her; and allowed the defenders to prove the state and condition of the Wells at the time she was run down.' A proof was accordingly taken, on advising which the Judge-Admiral found, 'that the collision of the Sprightly with the Wells, by which the latter was sunk, arose from the carelessness in the master and ship's company of the Sprightly, and the want of that due attention and precaution which was necessary for their own preservation and that of other vessels; and therefore found the defenders, jointly and severally, liable to the respective pursuers for damages and expenses.' Thereafter having resumed consideration of the cause, he held, 'of consent of all parties, that the value of the Sprightly was L. 1800 sterling, and the amount

June 15. 1824. ' of her freight was L.227. 18s. 10d. making together L.2027. 18s. 10d.; found it not denied, and therefore held the respondents as having confessed the value of the Wells to be L.1133. 4s. and that the value of her cargo was L.1989. 8s.; and therefore, as the former of these sums, viz, the value of the Sprightly and freight, is much less than the latter, the value of the Wells and cargo, decerned against the whole defenders, other than Captain Sutherland against whom a decree has been already given, jointly and severally, for the sum of L.2027. 18s. 10d. sterling, and found them jointly and severally liable in expenses; but assolizied them quoad ultra.' Against these judgments the appellants brought a suspension, and the respondents raised an action of reduction, in so far as they had not been allowed interest on the sums awarded; and both cases having come before Lord Gillies, his Lordship, after allowing an additional proof, reported the case to the Court. On advising informations, their Lordships, on the 14th June 1821, repelled the reasons of suspension, decerned in terms of the reduction, and found the appellants liable in expenses. The appellants then reclaimed, and their Lordships, on advising their petition with answers, found, ' that the decision of the present question between the parties depends upon the various degrees of pretention which, according to maritime custom, ought to be taken by vessels in the relative situation which the Sprightly and Wells bore to each other when the accident happened; and with a view to obtain authentic information on that subject, the Lords direct the agents to furnish the clerk to the process with a complete set of the printed papers, and direct the clerk to transmit them to Rear-Admiral Sir John Beresford, commanding on this station, with a letter requesting him, on the part of the Court, to report, in writing, the opinion which the perusal of the printed papers so transmitted shall enable him to form on the merits of the cause.' In consequence of this remit, Sir John Beresford made a report, addressed to the clerk of Court, which was in these terms:—' I have received your letter of the 2d instant, together with the printed pleadings, and evidence adduced by both parties in an action at the instance of the proprietors of the late brig Wells against the owners of the Sprightly, she having run the former vessel down whilst lying at anchor between the north shore of the Firth and the island of Inch-Keith; and I have also to acknowledge the receipt of a copy of their Lordships' interlocutor, directing the said printed pleadings and evidence to be transmitted to me, and requesting

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‘ I would report to the Court, in writing, the opinion which the  
 ‘ personal of them might enable me to form respecting the degree  
 ‘ of precaution which ought to have been taken by both these  
 ‘ vessels, under the circumstances in which they were respectively  
 ‘ placed. Having looked over the said pleadings and evidence  
 ‘ accordingly, and considered the relative situation which the  
 ‘ Sprightly and Wells bore to each other on the morning of the  
 ‘ 1st of March 1814, I am of opinion that blame is attachable to  
 ‘ both these vessels:—To the Wells, for not having a light in her  
 ‘ binnacle, or one in a lanthorn in readiness to be shewn to the  
 ‘ vessels passing near her, particularly as she was lying in a fair-  
 ‘ way. But I think that much more blame is imputable to the  
 ‘ Sprightly, for not having kept a better look-out when beating  
 ‘ to windward in such a fair-way, where vessels frequently anchor  
 ‘ to stop tide: also for not having put the helm hard down in-  
 ‘ stead of hard up, when she saw the Wells; for if she had put  
 ‘ in stays, she would either have avoided her altogether, or would  
 ‘ have so much deadened or lost her way, that if they had come  
 ‘ in contact the concussion could not have been of serious con-  
 ‘ sequence; but by putting her helm hard a-weather, she thereby  
 ‘ neared the Wells, and her velocity at the same time increasing  
 ‘ (by the act of bearing away), the concussion, therefore, became  
 ‘ much greater and more dangerous. This negligence and sub-  
 ‘ sequent misconduct of the Sprightly was, in my opinion; the  
 ‘ great cause of the accident.’ On advising this report, the  
 ‘ Court, on the 21st of February 1822, ‘ recalled the interlo-  
 ‘ cutor reclaimed against, and found the petitioners liable in  
 ‘ two-third parts of the damage, and of the expenses incurred,  
 ‘ and remitted to the Lord Ordinary to proceed accordingly.’

The respondents then lodged a petition, praying for explana-  
 tion in regard to the interest; and the Court, on the 7th March  
 1822, ‘ found the claim for interest applies, in so far as the same  
 ‘ shall not exceed the value of the Sprightly.’\*

Against these judgments the appellants having entered an ap-  
 peal, the House of Lords found, ‘ That both ships in this case  
 ‘ were in fault, and that the whole of the damage sustained by  
 ‘ the owners of the ship Wells, and of the cargo, which were  
 ‘ sunk and lost, should be borne equally by the parties; and find,  
 ‘ therefore, that the appellants are liable to the respondents in  
 ‘ the sum of L.1535. 16s. one-half of the value of the Wells  
 ‘ and of her cargo, such half not exceeding the value of the

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\* 1. Shaw and Ballantine, No. 452:

June 15. 1894. ' Sprightly and her freight. And the Lords further find, that  
' the appellants are not liable to pay interest on the said sum of  
' L.1535. 16s.; and that they and the respondents, respectively,  
' ought to bear and pay their own expenses of the proceedings:  
' And it is therefore ordered and adjudged, that the parts of the  
' interlocutors complained of, which are inconsistent with the  
' above findings, be reversed: And it is further ordered, that the  
' cause be remitted back to the Court of Session, to do in the  
' conjoined processes as shall be consistent with this judgment,  
' and as shall be just.'



LORD GIFFORD.—My Lords, This is undoubtedly a case of very considerable importance. It is an appeal which arose out of proceedings originally in the Admiralty Court of Scotland, and afterwards in the Court of Session, instituted by the owners of a vessel called the Wells, against the owners of a vessel called the Sprightly, for the damage which the owners of the Wells had sustained, in consequence of that vessel having been run down and sunk, and the property destroyed, by the ships striking. My Lords, the accident happened so long ago as the 1st of March in the year 1814. It appears that the Wells had been endeavouring to make her way into the Firth of Forth, and that she had come to an anchor, in consequence of the state of the weather, in what is termed the fair-way, that is, in that part of the Firth which is constantly navigated by vessels, at some distance from the island of Inch-Keith. It appears that she was there during the night of the last day of February and the 1st day of March, which appears to have been a very blowing night; and whilst she was in this position the Sprightly, which was also making her way up the Firth of Forth, came suddenly upon the Wells, and the Wells was run down and sunk. Fortunately no lives were lost—all the persons were able to make their escape; but the vessel and cargo were lost.

My Lords,—In consequence of this accident a proceeding was instituted by the owners of the ship Wells against the owners of the ship Sprightly, before the Judge-Admiral, and interlocutors pronounced by him, the result of which was making the owners of the ship Sprightly liable to the full extent of the value of the Wells, and of her cargo—limited, however, as that responsibility is by Act of Parliament, to the amount of the value of the ship occasioning the loss, and her freight. The result of that judgment is, that but for that Act of Parliament the owners of the ship Sprightly would have been liable to the whole injury sustained by the ship Wells, the Judge-Admiral being of opinion that the fault rested entirely with the Sprightly.

My Lords,—The cause was removed to the Court of Session; and the Court of Session, after a great deal of inquiry, referred the evidence to Sir John Beresford, the Port Admiral at Leith. Sir John Beresford made a report upon the evidence, and his judgment was,

that although fault was imputable to both vessels, he thought the greater blame rested on the ship *Sprightly*. In consequence of this report of Sir John Beresford, and in consequence of certain cases, or rather the dicta in cases, in the Court of Admiralty in this country, the Court of Session came to a decision, altering the decision of the Judge-Admiral, (who had decided that the whole damage should be borne by the ship *Sprightly*), and in as much as Sir John Beresford had decided that both ships were to blame, though the greater share of blame rested on the *Sprightly*, they found that the owners of the *Sprightly* were liable in two-thirds of the damage, under the limitations provided by the Act of Parliament.

My Lords,—This gives rise to a question undoubtedly of very great importance,—I mean the law of the Admiralty. In the Court below two cases were cited, decided by one of the most eminent Judges of this or any period, I mean my Lord Stowell, whose learning and whose accuracy are too well known to need any panegyric—indeed panegyric would be impossible. The first was the case of the *Woodrop, Sims*, which came before him in 1815, which was of the nature I will now state. ‘It was a case of damage at the instance of Thomas Potts and George Taylor, the owners of the brig *Industry*, against the above ship the *Woodrop, Sims*, her tackle,’ &c.;—it was by an accident which had happened by collision. In this case the Court called in the assistance of two of the elder brethren of the Trinity-House, acting as assessors to the Court, feeling it to be desirable, as in this case, to obtain the opinion of persons conversant with the nature of the subject. Lord Stowell, then Sir William Scott, states the law thus:—‘This is one of those important cases, in which the entire loss of a ship and cargo has been occasioned by two vessels running foul of each other. There are four possibilities under which an accident of this sort may occur. In the first place, It may happen without blame being imputable to either party, as where the loss is occasioned by a storm, or any other vis major. In that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree. Secondly, A misfortune of this kind may arise where both parties are to blame, where there has been a want of due diligence or of skill on both sides. In such a case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly,’ he says, ‘It may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burden. Lastly, It may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other.’ Now, your Lordships perceive in this case, Sir William Scott lays it down to be the law of the Court of Admiralty, that where a misfortune happens from the want of due diligence or skill on both sides, the loss must be apportioned between them, as having been occasioned by the fault of both.

June 15. 1824.

My Lords,—The subsequent case, which is reported by Dr Dodson, was a case in which the parties below have been enabled to obtain a very full note (I believe a short-hand note) of the judgment of Lord Stowell. It was the case of the *Lord Melville* in the year 1816. Sir William Scott pronounced his judgment as follows:—‘The Counsel having declined to make any further observations, the Court has now to decide upon this very melancholy case, for such it is certainly to be described, being attended not only with the loss of a valuable cargo, but with the destruction, infinitely more precious, of lives, produced by the accident, if it may be so described, of one ship running foul of another and sinking her. I have had occasion to observe, that accidents of this kind may happen in several very different ways. They may happen in a way which amounts to mere misfortune, and to nothing else, as where it is produced by the irresistible force of the elements, which human skill and human efforts are not able to controul; that is a case of mere misfortune. It may happen, secondly, by the misconduct of both parties; there may be negligence, or there may be want of skill, as well on the one side as the other. And in the former case, where it was the effect of accident uncontrollable by human skill and industry, then the misfortune rests with the party on whom it happens to light; but when it happened by the common fault of both parties, the ancient rule of the Admiralty was, that it should be considered a common loss to which they were justly liable. A third way in which it may happen is by the default of the crew of the vessel to whom the misfortune has occurred: it may be the consequence of their own negligence, of their own obstinacy, of their own want of attention,—in which case she is to suffer the consequences: or it may happen by the fault alone of the vessel which strikes the other,—in which case, however slight the misconduct may be that is imputable to this vessel, she is undoubtedly answerable for the whole of the consequences.’ Your Lordships will perceive, that, according to the note of this case, Lord Stowell there uses this expression,—‘The ancient rule of the Admiralty was, that it should be considered a common loss.’

My Lords,—These were the cases cited in the Court of Session, and on these dicta undoubtedly the Court of Session proceeded in the apportionment of the damages. It was argued at your Lordships’ Bar, that though any dictum proceeding from that learned person, particularly in such a question, was entitled to the highest weight, yet that no case could be produced in which that law of the Admiralty, if it was the law of the Admiralty, had ever been acted upon,—that no case had been produced in which there had been such an application of it. It was therefore contended, that from the inconveniencies, particularly from its conflicting with another law which prevailed in all Courts, that a party had no right to complain of a loss sustained partly by his own fault, the dictum of my Lord Stowell adopted by the Court of Session could not now be considered as the law of the

June 15. 1834.

Court of Admiralty; and that in this case, therefore, this interlocutor ought to be reversed. My Lords, it is not my intention to carry your Lordships through the laws of the different European states upon this subject; but undoubtedly I might, with respect to many of them, state, that the law is the same as my Lord Stowell says was the ancient rule of the Admiralty here. The law of Holland, undoubtedly, as cited in Becher, a book of great authority, though the learned author does not concur with those decisions, is the same as laid down by my Lord Stowell to be the law of the Admiralty. In that book, the 4th chapter, nine cases are mentioned, in which the Court of Holland decided, that if both parties are in fault, the loss shall be divided. I observe, Becher himself seems to admit there is a doubt how far that ought to be the law. But, my Lords, we are here on the law of the Admiralty in England; and I must confess, that if no case could be found in which this principle had been applied, where I find a Judge of the authority of Sir William Scott, now Lord Stowell, laying down with great care and caution, (and no man is more careful and cautious in laying down principles than that learned person), I think your Lordships would pause considerably before you said that that which that noble and learned person had laid down as the law of the Admiralty of England was not the law. But, my Lords, I have by that very high authority in that Court been furnished with a note of a case in which he was Counsel, and of which I have been fortunately able to obtain the judgment entered up in the Court of Admiralty; that was the case of the *Petersfield* against the *Judith Randolph*, in 1789, decided before a very eminent Judge of that Court, Sir James Marriott, in which case the present Lord Stowell and Sir John Nichol were both Counsel. In that case, the Court had the assistance of two elder brethren of the Trinity-House; and it is very singular, they found that both ships were to blame, but that the *Judith Randolph* was most to blame; and though they found the *Judith Randolph* most to blame, they apportioned the loss equally between the two vessels. And, my Lords, in that case, a case was referred to, but which I have been unable to procure, as having been decided by Sir Charles also a very eminent Judge of the Admiralty in the time of Queen Anne, in which he had applied the rule of the Admiralty. I will, as it is very short, read to your Lordships the judgment entered up finally in that case: 'For further information and sentence, Captain Hector Rose, and Captain Henry Hinde Petty, two of the elder brethren of the Trinity-House, again attended as assessors to the Judge in this cause; and the Judge having heard the proofs read, and advocates and proctors on both sides, and likewise the opinion of the said Trinity brethren, by his interlocutory decree pronounced, that both ships were in fault, and that the *Judith Randolph* was most in fault; and decreed, that the whole damage sustained by the owners of the ship *Petersfield*, and her cargo, which was sunk and lost, as well as the L. 230 damages and expenses given against the ship *Petersfield*, and



June 15, 1824. 'the costs of suit here on both sides, be borne equally by the parties in this suit;—(so that this case shews most clearly that my Lord Stowell was right, in one of the cases to which I have referred, in saying this was the ancient rule of the Admiralty);—' and assigned 'for hereon liquidation of damages, and taxation of expenses, the third session of next term; and referred the liquidation of the said damages and expenses to the Registrar, taking to his assistance two merchants; and assigned Heseltine to bring in a schedule of damages by the first day of next term, and both proctors to bring in their bill and costs of suit in this Court by the same time.—Present, Heseltine and Bush for Jenner.' I say, my Lords, you have here the authority of a decided case in the Court of Admiralty for the application of the principle which has been applied to this case.

It affords me great satisfaction to have got possession of this case in the Court of Admiralty, because at the Bar it was undoubtedly stated, both by the learned civilian who argued for the appellants, and the learned civilian who argued for the respondent, that they were not aware of any case in which that rule had been laid down. But it was argued, that whether such authority was found or not, the authority of Lord Stowell ought to decide that question: but it is satisfactory to find, that in addition, if it were necessary to the authority of that noble and learned Lord, you are deciding upon a point which has already received the express decision of the Court of Admiralty, the rule having been already applied under circumstances similar to those which occur in the present case. My Lords, it also gives me great satisfaction to state to your Lordships, that I have had the advantage of a communication with that noble and very learned person upon the subject of this case, feeling it to be my duty, in consequence of the difficulty from its being a branch of the law with which I am not particularly conversant. My Lords, if I felt a hesitation on the dictum pronounced by that noble and learned person, I should still feel great difficulty in advising your Lordships to pronounce against it, after the communication with that noble and learned person, and the authority of the judgment in 1789, with which I have been furnished. I apprehend, that that laid down in the case of the Woodrop, Sims, is established to be the law of the Court of Admiralty, and has been acted upon by the Court: and, my Lords, I have the less difficulty in asking your Lordships to come to a decision of equally apportioning the loss in this case, for your Lordships must have seen, I think, that it would be extremely difficult in this case to balance the degree of negligence in the one and the other.—I think they were, perhaps, equally culpable; and I have no difficulty, therefore, in recommending to your Lordships to apply the judgment of Sir James Marriott in the case of the Judith Randolph. If your Lordships were to take any other rule, one cannot conceive any mode of properly apportioning the loss which the Court of Session have found to have occurred. It might be extremely difficult to regulate the quantum of neglect on the one side and the

other, and to apportion the damages by any other rule; but I have no difficulty in advising your Lordships to come to that decision, because, on a review of the evidence, I was strongly impressed with the negligence on the part of the Wells, in not shewing a light, as Sir John Beresford says she ought to have done, when she saw the Sprightly coming down upon her. At the same time I have no difficulty in saying, there was great negligence on the part of the Sprightly, in not having the look-out she ought to have had, considering the place in which she was. I should therefore take the liberty of moving your Lordships to find, that both ships in this case were in fault, in the language of the judgment in the case of the Judith Randolph; and that the whole damage sustained by the owners of the ship Wells and her cargo, which was sunk and lost, should be borne equally by the parties: that the appellants are therefore liable in the sum of L.1509. 16s. which is not disputed to be one-half of the value of the Wells and her cargo, such half not exceeding the value of the Sprightly and her freight. Your Lordships perceive by the statute to which I also adverted, and it is conceded at the Bar, that the liability of the owners of the Sprightly is limited to the value of the Sprightly and her freight; but inasmuch as it seems the value of one-half of the Wells is much less than the value of the Sprightly, she is liable to the half of the damage. Then I should propose to your Lordships to find, that the appellants are not to pay interest. I do not think, in such a case as this, they ought to be called upon to pay interest upon this sum; and that the respondents and appellants ought to bear respectively their own expenses in the suit. As respects Sir James Marriott's case, the expenses were brought together and divided; it would perhaps be more equitable to say they should each pay their own expenses. Then to reverse such parts of the interlocutor as are inconsistent with their findings, and that the cause should be remitted to the Court of Session, to do in the conjoined processes as shall be consistent with these findings, and shall be just. I will draw out the judgment in form, and will submit it to your Lordships to-morrow morning.

*Appellants' Authorities.*—Pardessus, p. 505.; 1. Emer. 416.; Valin, 170.; Sea Laws, p. 187.; Laws of Oleron, art. 14.; 2. Bynk. 467.; Welwood, ch. 120.; 2. Molloy, 6. 10.; Stypm. ch. 19. § 51.; Marshall, 493.; Case of the Lord Melville, Nov. 26. 1816, per Lord Stowell.

*Respondents' Authorities.*—2. Dods. 63.; Jeremy's Dig. 121. p. 2.

J. RICHARDSON—JOHN BUTT,—Solicitors.

(*Ap. Ca. No. 64.*)

No. 50.

THOMAS RICHARDSON, W. S. (for DOUGLAS, HERON and Company) and Others, Appellants.—*Mackenzie.*Countess-Dowager of HADINTON, and Husband, Respondents.—*Fullerton—Adam.*

*Foreign—Prescription—Bankrupt.*—A Scottish bankrupt under sequestration having gone to Russia, and resided there for more than ten years, and till his death; and having left a fortune, to which his daughter, residing in Scotland, succeeded; and she having brought an action of declarator before the Court of Session against her father's creditors, to have it found that the debts were extinguished by the decennial prescription of Russia, and null and void; and the Court having decreed in terms of the libel;—The House of Lords found, That the debts were not null and void, and extinguished; but remitted to the Court of Session to make further inquiries into the effect of the law of Russia, under the circumstances of the case.

June 16. 1824.

1st DIVISION.  
Lord Gillies.

CHARLES GASCOIGNE, a native of Scotland, was a partner of Francis Garbett and Company, merchants at Carron Wharf. On the 25th June 1772, the estates of that Company, and of Mr Gascoigne as an individual, were sequestrated under the 12. Geo. III. ch. 72. Mr William Anderson, writer to the signet, was appointed trustee, in whose favour Mr Gascoigne executed a conveyance of the effects both of the Company and of himself, and under whom he acted as manager. The sequestration had, under a provision of the above statute, been superseded by a trust; but, on the 23. Geo. III. ch. 18. being passed in 1783, it was revived, and proceedings took place as if it had been an original sequestration. Mr Hogg was named interim factor, and afterwards trustee,—Mr Gascoigne was examined before the Sheriff,—the creditors produced their grounds of debt and affidavits, and regular meetings were held. Mr Gascoigne continued to reside at Carron Wharf, and to act as factor for the trustee, till 1786, when he left Scotland, and went to Russia. He there realized a large fortune, and in 1798 he made a proposal, through his friend Mr Elphinstone, to pay a sum of money to the trustee, in consideration of a discharge being granted to him by his creditors. A great deal of correspondence took place in relation to this subject, in the course of which it was never alleged that the debts were extinguished; but, on the contrary, the proposition for a discharge was made on the assumption of their being still in subsistence. This negotiation, however, did not prove successful; and, in the meanwhile, Mr Gascoigne had indorsed and remitted certain bills to his daughter, Lady Hadinton, residing in

Scotland, accepted in his favour by Messrs Stein, merchants in Scotland; and for payment of which she raised an action before the Court of Session, obtained decree, and afterwards recovered the amount. Mr Gascoigne died in Russia in 1806, leaving a will, whereby he conveyed his whole effects to his daughter, Lady Hadinton. Soon after this event she renewed the proposal which had been made by her father for a discharge of the debts, on payment of L. 10,000. After much correspondence this proposition also proved unavailing. In the meanwhile the sequestration was carried on, and Mr Hogg having died, Mr Henderson was appointed trustee in his place, and a dividend of 11s. in the pound was paid. In 1812, Gibson and Balfour, creditors of Mr Gascoigne, brought an action of reduction against Lady Hadinton of the bills, (on which she had obtained decree against the Messrs Stein), alleging that she was a conjunct and confident person, and that they were liable to be set aside on the Act 1621, and that she was bound to account for the amount of them. At the same time another action was brought by Mr Home of Paxton, as manager for Douglas, Heron and Company, creditors of Mr Gascoigne, concluding against Lady Hadinton for payment of upwards of L. 20,000, on the passive titles, and as holding certain bills in trust for her father. These actions led to a renewed proposal by Lady Hadinton for a discharge, but this was unsuccessful. She then, with concurrence of her husband, raised an action of declarator before the Court of Session against the creditors, in which, after setting forth the facts above-mentioned, and that Mr Gascoigne had gone to Russia in 1786, *animo remanendi*—that he had been domiciled there—had become a naturalized subject of that country, and resided there till his death, (being twenty-one years from the date of his leaving Scotland)—that no judicial proceeding had been adopted against him according to the laws of Russia by any of the creditors—that the debts were totally extinguished by the decennial prescription of Russia, and that she had merely by his death acquired a Russian succession,—she concluded, that ‘it ought and should be found, decerned, and declared, by decree of our said Lords, that the said pursuers are not accountable in Scotland to all or any of the said creditors, or pretended creditors, defenders, or any other person whatsoever, for their intromission with, and the administration of the estate, means, and effects of the said deceased Charles Gascoigne, heritable or moveable, real or personal, acquired and left by him at his death in Russia, and subject to the laws of that empire; and further, and at all events, it ought and should be

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June 16. 1824. 'found, decerned, and declared; that all and each of the debts due, or pretended to be due, to the persons above-named and designed, or their predecessors, authors, or cedents, were, at the time of the death of the said Charles Gascoigne, and are now, and in all time coming, null and void, and extinguished in law, and can be followed with no legal diligence, compulsion, execution, or effect of any description; and of consequence, that the said Ann, Countess-dowager of Hadinton, and her said husband, pursuers, and all others, the children, family, and representatives of the said Charles Gascoigne, are freed and discharged of the said debts, or pretended debts, in all time coming,' &c.

In defence the creditors denied there was any such law in Russia having the effect alleged; and they maintained, that their debts could not be affected by the law of Russia; but that, supposing there was such a law, and that their claims could be affected by it, still they were protected by the sequestration, and taken from beyond the effect of the Russian law by the terms of the correspondence.

The Lord Ordinary appointed Lady Hadinton and her husband to give in a condescendence of the facts they averred, and particularly as to the residence of Mr Gascoigne in Russia, and the law of that country as applicable to this case.' Thereafter his Lordship remitted to George Joseph Bell, Esq. advocate, to make up a Case for the opinion of Russian Counsel, who accordingly did so, and it having been approved of, it was laid before Mr A. Brockhausen and Mr George Hartmann, Russian advocates. In the Case, after stating the facts, and referring to the correspondence, these queries were put to the Counsel:—

' I. Without having any regard to the proceedings in Scotland, or the foreign origin of the debts, be pleased to say,—

' 1. Whether, by the law of Russia, a person who takes, under the will of a father, the estate or effects which belonged to him, does thereby become responsible in Russia for his debts? And if so, whether for his foreign debts, as well as for those due in Russia?

' 2. Whether there is any difference between such responsibility, supposing it to be incurred, and the responsibility of the original party, either as to endurance or otherwise?

' 3. Whether there be, in the law of Russia, any limitation or prescription, by which the right of a creditor to demand his debt, either from the debtor himself, or from his heir, is discharged, or cut off, in consequence of the lapse of time; ten years

or any other space of time? And be pleased to explain, whether, by any form of judicial or extrajudicial demand; this discharge, from lapse of time, may be interrupted; and what the distinguishing character of such interruption is? June 16. 1894.

‘ 4. Whether, if any judicial demand has been made in Russia, and the creditor has ceased to persist in that demand, the debt would be discharged by prescription? And what period of cessation from such action or demand is requisite to produce this effect?

‘ II. Taking the supposition, that, by the law of Scotland, the debt would be discharged by prescription, and that the proceedings in bankruptcy would have no effect in preventing the rule of prescription from applying, be pleased to say,—

‘ 1. Whether the creditor would still be admitted to make his demand in Russia against the original debtor, if alive? or against his heir taking his succession, after his death?

‘ 2. What would be the effect; in the Russian tribunals, of the correspondence between the parties, in reviving a responsibility which otherwise would have been held as discharged?

‘ III. Taking the supposition, that the proceedings in bankruptcy in Scotland, if not overruled or counteracted by the Russian law of prescription, have kept the debt alive there, so that it might be demanded from the original debtor, if still in life and in Scotland, or from his heir, being in that country, and having effects derived from the will of the original debtor, be pleased to say,—

‘ 1. Whether would the debt be demandable also in Russia; either from the original debtor, if alive, or from his heir in possession of his estate and effects? Or would any Russian law of prescription be held to discharge the person of the debtor or his effects from responsibility for the debt?

‘ 2. Would the correspondence already referred to have any effect in establishing, in the Russian tribunals, a responsibility not otherwise incurred?

To these Mr Hartmann returned the following answers:—

‘ I.—1. As soon as the heir takes possession of the property of the deceased, he becomes responsible for the debts and other obligations of the deceased, not only to the whole amount of what he has inherited, but as far as his own personal means will extend; and that responsibility attaches to debts both in and out of Russia. Code of Laws (Oulogenie).—Ordinances of the years 1714, 1716, and 1725.—Regulations as to Bills of Exchange.—Bankrupt Regulations.

‘ 2. There is no difference between such a responsibility and

June 16. 1824. that of the first debtor, either by its duration or otherwise.—  
Bankrupt Regulations.

‘ 3. The 4th section of the Imperial Manifest of the 28th June 1787, fixes the prescription of ten years for every process whatever; and after the expiration of this period, the right of a creditor to demand his debt, either from the first debtor or from his heirs, becomes completely null and void; and this annihilation of the right, after the lapse of ten years, can neither be prevented nor interrupted by judicial or extrajudicial forms.—Bankrupt Regulations, Part II. Section 13. § 69.

‘ 4. In the event of a judicial demand having been made, and that the creditor had ceased to persist in it, ten years must elapse after that cessation, to produce the effect of prescription.—Imperial Manifest, 28th June 1787, § 4.—Bankrupt Regulation, Part II. Section 13. § 69.

‘ II.—1. If, by the laws of Scotland, a debt becomes annihilated by prescription, the creditor in that case cannot make his demand in Russia against the first debtor, or against the person who has inherited from him after his death, supposing the time fixed for the prescription in Scotland to be also at least ten years.

‘ 2. It is true that, according to the Military Regulation admitted in all civil causes, (Process, 2d Part, chap. 4. §§ 2, 3, and 4.), the correspondence which has existed between the parties interested may give rise to motives for entering upon a new process; but as that regulation, as well as the ordinance of the 5th November 1723, are only expressed in general terms upon the forms of proceedings, and as no positive law exists declaring that a private or particular correspondence entered upon between the debtor or his heirs with the creditors, after the prescription has been in operation, might oblige that debtor to pay his creditors a debt already superannuated, it is impossible to guarantee the fortunate result of such a process. Still it is true, that there exists similar instances where the Supreme Ruling Senate has pronounced in favour of the creditors; but these decisions have only been given in special cases, and they have not been promulgated as established laws. Further, no precedents can ever be considered as laws; according to lib. 13. Cod. de Sent. et Interloc. where it is said, *Non exemplis sed legibus adjudicandum*. In short, in entering upon such a process, the adverse party must be upon the spot; and the duration of such a litigation is not only very long, but subject to considerable expense.

‘ III.—1. Supposing that the bankrupt proceedings in Scotland have had the effect of perpetuating and continuing the debt, and that there had been a formal judgment against the debtor, of a date within the period of ten years; then the creditors might demand, in Russia, the payments from the first debtor, in case he was alive, or if he was dead, from his heirs. June 16. 1894.

‘ 2. The correspondence which has subsisted between the parties interested may contribute to establish before the Russian tribunals a responsibility, as it has been before observed.’

Mr Brockhausen made these answers :—

‘ I.—1. Every heir entering into the possession and enjoyment of the property of a debtor, is under the obligation of paying the debts of the deceased, wherever they exist, without any distinction or contravention whatever;—as it is prescribed in the Code of Laws, (Oulogenie), chap. 10. §§ 132. 207. and 245.—Ordinances of the years 1714, 22d March; 1716, 15th April; 1725, 28th May.—Regulation regarding Bills of Exchange, 1729, 16th May, § 22.—Ordinances, 1730, 9th December; 1731, 17th March; 1756, 6th September; 1763, 7th May.—Bankrupt Regulations, 1800, 19th December; First Part, 161. and 165.; Second Part, § 110.

‘ 2. Foreign creditors enjoy the same rights as those living in the country; and the heir, in accepting the property, even if of less value than the amount of the debts, becomes personally responsible for the whole, and must make up the deficiency from his own funds.—Bankrupt Regulations, § 165., and Second Part, § 110.

‘ 3. Any debt not judicially claimed, or process, although instituted, and not followed up during a lapse of ten years, is annulled and condemned to eternal oblivion, by the law alone, without intervention of the debtor. Manifest of the year 1787, 28th June. But when there is no interval of ten years from one petition to another, or of any other proceeding judicially verified, the reclamation, or process, remains in full force.

‘ 4. See Answer 3.—The debtor may produce the act of prescription the day following the last day of the expiration of the tenth year.

‘ II.—1. According to the Manifest of 1787, no reclamation would be any longer admitted, either against the debtor, if in life, or against his heirs representing him, after his death. It would be equally the same if there was a prescription of a foreign tribunal.

‘ 2. The correspondence would necessarily revive motives to



June 16. 1824, enter upon a new process, if ten years have not elapsed from its date.—Military Regulation, (admitted in all civil cases).—Processes, 2d Part, chap 4. §§ 2, 3, and 4.

‘ III.—1. If the debts were recognized as valid by a foreign tribunal, and that there was a formal judgment against the debtor of a date within the period of ten years, then a judicial execution against the property of the debtor, or of his heirs, would be admitted in its full vigour; and there exists no law against it.

‘ 2. The correspondence, written or signed by the hand of the debtor, or of his heirs, may serve as a motive for establishing in Russia a new process in due form (plaidoyer), according to the ordinance of 1723, 5th November; but the correspondence of a third person cannot be sustained as proof, unless it is accompanied by a full power; so that, to enter upon such a process, it would be necessary for the adverse party to be upon the spot. N. B.—The progress of such a process is very slow, and the expense considerable.’

The Lord Ordinary having reported the case upon informations, and the actions at the instance of Gibson and Balfour and Mr Home against Lady Hadinton having also been brought before the Court at the same time, their Lordships, on the 6th of March 1821, pronounced this interlocutor:—‘ The Lords repel ‘ the defences in the process of declarator and extinction brought ‘ at the instance of the Countess of Hadinton and her husband, and decern and declare in terms of the conclusions of ‘ the libel in the said process; and in the several processes ‘ brought against the said Countess and her husband, at the instance of Messrs Gibson and Balfour and the late George ‘ Home of Paxton, the Lords sustain the defences, assoilzie the ‘ defenders from the conclusions of the several libels in the said ‘ processes, and decern accordingly; and find neither party liable ‘ to the other in the expenses of process in the said actions, or ‘ any of them.’ \*

Against this judgment Mr Richardson, (who had now succeeded Mr Home as manager of Douglas, Heron and Company), together with Gibson and Balfour, and the trustee in the sequestration, (which was still in dependence), appealed, and maintained that it was erroneous,—

1. Because (abstracting from the sequestration) Mr Gascoigne

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\* Not reported.

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himself had no right to have pleaded the Russian law of prescription in the Court of Session. In support of this proposition they argued, that there was no foundation, either in reason or legal authority, for the general proposition which was maintained by the respondents, that in all cases whatever the question of prescription of debts must depend on the law of the residence of the debtor, without respect to the residence of the creditor,—the place of contract,—the place of performance,—or the Court in which the question is tried. As to the reason of the thing, the law of prescription is a law directed to the creditor. It is a law commanding him to sue for payment or performance within a certain time, under the penalty of losing his claim in case he shall not, or of being limited to certain kinds of evidence, or other such consequences. When, therefore, two Scotchmen contract in Scotland for payment or performance of something in Scotland, it does not appear how the debtor, going away without the consent of the creditor—it may be without his knowledge—to foreign countries,—to Kamtschatka for instance, or to China, or to Spanish America, or any other remote part of the earth,—can subject the creditor, who remains in Scotland, to the laws of prescription of these places. These laws may command creditors to sue for payment or performance within ten years, or within three years, or within one year; but the question is, how the creditor, who never was within the territory of these laws, can be at all affected by them? The rule is, *Statuta non exeunt territorium*. These laws may be very proper in respect to creditors who are subject to them. But what has a Scotch creditor to do with them who never leaves Scotland, but there contracts with another Scotchman, and there sues his debtor? It is said, no doubt, that prescription is founded on presumption of payment, or of abandonment by the creditor; and that either of these views of it leads necessarily to its being regulated by the law of the debtor's domicile. But it is impossible to see how this conclusion can be drawn. If payment is to be presumed, it must be presumed to have been made in the country where it was stipulated by the obligation; that is, in the present case, in the country of the creditor. It is the law of Scotland, therefore, which must regulate what are the circumstances which are to be equivalent to payment there. The same may be said of abandonment. There can be no presumption of this so long as the obligation to pay exists by the law of the country where it is alone prestable, and where the creditor is entitled to expect it to be fulfilled. In regard to the authorities, it was true that,

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when a person who has contracted a debt in another country, and comes afterwards to fix his residence in Scotland, and to be prosecuted there, the Court have, in several instances, followed their own prescriptions, or those of the *lex loci contractus*, but they have not done so uniformly. In the present case, however, this was not the species facti; because here the debts had been contracted in Scotland, and the creditors were not pursuing for payment in the foreign court within whose jurisdiction the debtor resided, but the representative of the debtor had brought an action against the creditors before the court within whose jurisdiction the debts had been contracted.

2. Because the proceedings in the sequestration were sufficient to prevent Mr Gascoigne from pleading the Russian law of prescription in the Court of Session. A sequestration is a judicial process for recovering payment of debt; and it is impossible to maintain, that if an ordinary action had been raised, and the defender, during its dependence, had gone to Russia, and remained there for ten years, he could plead a defence that the debt was thereby extinguished. If not, then as the sequestration was both an action of constitution and of realization, and the Bankrupt Statute expressly declared that the lodging of a claim should have the effect to interrupt prescription, it was impossible that Mr Gascoigne, or his representative, could maintain the present plea. And,

3. Because, even if the Russian law of prescription were held admissible, the respondents had not established, by the opinions of the Counsel, that it would have the effect to extinguish the debt under the circumstances of this case, and particularly with reference to the correspondence.

On the other hand, it was maintained by the respondents,—

1. That long before the death of Mr Gascoigne, the claims of the appellants had been completely extinguished by the prescription of the law of Russia; which, as being the law of the domicile, must be held to determine the question of his liability. Whatever may have been the origin, in theory, of the law of prescription, its admitted operation is to extinguish the rights of the creditor, or, at all events, to afford the debtor a plea in bar of those claims, as complete as if a regular discharge had been granted by the creditor. When the creditor and debtor are both resident in the same country, the law of that country, of course, decides the question. When they reside in different countries, in which different periods of prescription are introduced, the question becomes more difficult; but yet the adoption of the

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law of the domicile of the debtor will be found to be a necessary consequence, from the very objects which the law of prescription was intended to answer. Its chief and leading object is the protection of the debtor; and that object is accomplished by attaching to the lapse of a certain time, without any claim against the debtor, the effect of a discharge. But, as it is clear that the courts of the debtor's domicile are, in general, the only courts in which a personal claim can be made, it seems to follow, that the law of that domicile must determine the precise period upon which the debtor's prescriptive immunity from such personal claims will depend. The debtor, knowing that he can only be summoned in those courts, is entitled to plead, that the silence of the creditors, during that period which the law of those courts hold as extinguishing claims by prescription, must protect him from future demands; and, on the other hand, the creditor, who, as in every other case of contract, debet scire conditionem ejus cum quo contrahebat, must be presumed to know the law of that country, before whose court alone the debtor could be cited with effect; and, consequently, to have voluntarily subjected himself to that implication of the discharge of the debt, which the law of that country attaches as a penalty to the neglect of its enforcement during a certain specified period. In short, as the practical effect of prescription every where is the discharge of the debtor, in consequence of the creditor's failure to claim during a certain period; and as the claim, if personal, can be made only in the domicile of the debtor, it follows, that the non-claim during the period of prescription, sanctioned by the law of the domicile, effects a discharge, good according to the law of that country where the *res gestæ* effecting a discharge took place.

2. That the circumstance of the existence of the sequestration could make no alteration in the case. There was no similarity between an ordinary action and a sequestration. It may be true, that when an action is raised against any party, and issue fairly joined, the dependence of such action will bar prescription. But although the application for a sequestration is a measure directed against the debtor, and if the demand is opposed, a procedure arises, which, like any other depending action, might bar the currency of any prescription, of which he might otherwise have had the benefit, against the creditor making the application; yet, upon the final award of sequestration, that dependence is closed; and the sequestration is just the execution of the decree of the Court, divesting the bankrupt of the

June 16. 1824. whole effects of which he is possessed, and vesting them in the creditors, through the intervention of a trustee. Its effect is to separate the debtor's effects at its date from the person of the debtor. It carries those effects to the creditors, for the purpose of being appropriated in payment of their debts; but in so far as concerns the debtor's subsequent acquisitions, new measures are necessary to attach them, and to subject them to the payment of the creditors. Now, such new measures being absolutely necessary, it seems to follow, that the power of taking these measures may be lost by prescription, like the power of enforcing any other right. The creditors under the sequestration form a corporate individual, who has, in the first place, acquired the debtor's whole existing funds at the date of the sequestration; and who, in so far as unpaid by those funds, continues a creditor against the acquirenda of the bankrupt for the balance. But the rights of the corporate body, in this last respect, may be lost by prescription, like those of every other creditor, unless that prescription is interrupted by measures taken directly against the debtor. And it is impossible to hold that any such effect can arise from proceedings, taken in the sequestration, merely for the management and distribution of the funds vested in the creditors. These proceedings consist of the steps taken for ascertaining the comparative rights of the individuals of which the corporate body is composed. They are merely acts of administration of the funds placed in their hands by the execution of the decree against the debtor. They are consequently measures which may exclude the currency of prescription in any question between each other and with the sequestrated fund. But they can have no effect whatever in barring any prescription running in favour of the debtor, against the claims which the corporate body of the creditors, or any of the individuals of that body, may have against either his person or any subsequently acquired estate, for the balance.

And, 3. That as the object of the present action was to have it found, that the respondent, Lady Hadinton, who had acquired, not a Scottish but a Russian succession, was not liable to the claims of the creditors, the proper question was not, whether the debts could have been enforced against Mr Gascoigne, but whether she, as taking under the law of Russia, was responsible for these debts, which she maintained she was not.

The House of Lords pronounced this judgment:—‘The Lords find, that the debts due to the persons named and designed in the summons of the said respondents, or to their predecessors, authors,

‘ or cedents, were not, at the time of the death of the said Charles Gascoigne, nor are now, null, void, or extinguished in law :  
 ‘ And with this finding it is ordered, that the said cause be re-  
 ‘ mitted back to the Court of Session, to review generally the in-  
 ‘ terlocutor complained of; and, in reviewing the same, the said  
 ‘ Court is especially to consider, whether, by the law of Russia,  
 ‘ due regard being had to the proceeding in the sequestration,  
 ‘ and its effect in preserving the rights of the creditors till their  
 ‘ debts are fully satisfied, and to the communications between  
 ‘ the said Charles Gascoigne, and also between the said Countess and the trustee under the said sequestration, the debts of  
 ‘ the said creditors could now be enforced in Russia against the  
 ‘ representative of the said Charles Gascoigne there; and for  
 ‘ that purpose to obtain farther opinions of Russian lawyers  
 ‘ upon a more full and accurate statement of the nature and ef-  
 ‘ fect of the process of sequestration, and of the aforesaid com-  
 ‘ munications: And further, in the several processes brought  
 ‘ against the said Countess and her husband, at the instance of  
 ‘ Messrs Gibson and Balfour, and the late Mr Home of Paxton,  
 ‘ particularly to consider the time and occasion of Stein’s bills  
 ‘ being made payable to the said Countess, and whether the said  
 ‘ bills, or the sums recovered upon them, can or cannot be con-  
 ‘ sidered as effects of the said Charles Gascoigne, received by the  
 ‘ said Countess in Scotland; and whether, if they can be con-  
 ‘ sidered as the effects of the said Charles Gascoigne received by  
 ‘ the said Countess in Scotland, she is on that account liable to  
 ‘ any, and what extent, to the said pursuers in those processes,  
 ‘ or any of them: And after reviewing the said interlocutor,  
 ‘ that the said Court do and decern in the said cause as to them  
 ‘ shall seem meet and just.’ \*

**LORD GIFFORD.**—My Lords, There was a case in which Thomas Richardson and others are the appellants, and the Countess-dowager of Hadinton and James Dalrymple, her husband, are the respondents. I will state to your Lordships, as briefly as I can, the circumstances of this case; and, having so done, state to your Lordships what observations occur to me upon this, which is undoubtedly an extremely important case, involving a question of very considerable difficulty and nicety.

My Lords,—It appears that a gentleman of the name of Charles Gascoigne was a partner in a firm of Garbett and Company, mer-

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\* After certain proceedings under the remit, the parties settled the case.

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chants at Carron Wharf in Scotland; and so long ago as the month of June 1772, the personal estate of that Company, and of Mr Gascoigne as an individual, was on the application of Mr Gascoigne sequestrated, under the provisions of the statute of the 12th Geo. III. cap. 72. In consequence of that, the personal estate of Mr Gascoigne was vested in a gentleman of the name of Anderson, as trustee under that sequestration. Afterwards, in the year 1781, a gentleman of the name of Hogg was appointed trustee in the room of Mr Anderson; and the sequestration was renewed under subsequent Acts of Parliament, particularly the 23d of the late King, cap. 18. for the heritable property of Mr Gascoigne, as well as his personal effects. The same gentleman was appointed first interim factor, and in March 1784 chosen trustee, under that sequestration; and in consequence of his death in 1803, (for these proceedings have gone on ever since the year 1772, up to the very hour in which I am addressing your Lordships), a gentleman of the name of Henderson was appointed trustee in place of Mr Hogg; and the sequestration proceeded under the Act of 23d Geo. III.

My Lords,—Mr Gascoigne, for some years after the original sequestration, acted as factor to the trustee, until the year 1786, when he left Scotland, and went to reside in Russia. There he resided for a great number of years, until his death, which happened in the year 1806; and, during his residence there, it appears that he realized a very considerable property. Wishing to return to Scotland in the year 1798, propositions were made by a gentleman of the name of Elphinstone, on behalf of Mr Gascoigne, to compromise with his creditors: but that negotiation proved ineffectual. The debts of this Company were extremely large. There had been a dividend of ten or twelve shillings in the pound paid, but a very large balance remained. Mr Gascoigne at this time proposed to pay the sum of L.10,000 to get relieved from that sequestration. The result however was, that the negotiation entirely failed. In the year 1806, Mr Gascoigne died in Russia, conveying, by a will made in Russia, his succession to his daughter, the Dowager Lady Hadinton, who is one of the respondents in this case. After his death, proposals were again made by Lady Hadinton to compromise with the creditors; but these proposals were ineffectual, and no compromise took place.

My Lords,—It appears that, previous to Mr Gascoigne's death, certain bills on a person of the name of Stein had been drawn, payable to Lady Hadinton, but drawn certainly on account of Mr Gascoigne, then residing in Russia, and that Lady Hadinton, as the person named in those bills, ultimately obtained payment of them from Stein. In consequence of these circumstances, in the year 1812 actions were brought against Lady Hadinton, as her father's executrix, and against her husband; one by two persons of the name of Gibson and Balfour, who brought an action for reducing the bills under the statute of 1621; and another brought by a gentleman of the name of Home of Paxton, factor and manager for Messrs Douglas, Heron and Company, who

had been creditors of Mr Gascoigne for upwards of L. 20,000. They June 16. 1834.  
brought those actions against her as having received, in trust for her father, those bills upon Stein; and, by a summons, Mr Home concluded for payment of the balance due to Douglas, Heron and Company, of the debt and interest.

My Lords,—In consequence of these proceedings, Lady Hadinton, in order if possible to put an end to those claims, instituted, in the year 1816, an action of declarator; and it will be important to call your Lordships' attention to the conclusions of the summons in that action. Your Lordships will be thereby informed what it was that Lady Hadinton sought to have declared in that action. My Lords, that summons, after narrating shortly the same facts I have stated to your Lordships, proceeded to state, that, in consequence of Mr Gascoigne's residence and domicile in Russia, and by the laws of Russia, his debts were totally discharged and extinguished by prescription. It then goes on to state, 'that during his residence in Russia he held various employments under the Russian government, and became a public accountant, liable to that government for large balances and otherwise, which, with other large debts which he had contracted in Russia to natives of that empire, amounted to a sum exceeding the funds which had come into his hands while he lived there, consisting of the salaries and other profits arising from his employments. That the said Charles Gascoigne had not the good fortune to obtain formal discharges from his creditors in this country; and finding, or suspecting that they were disposed to withhold such discharges, in expectation that he would be able to realize a considerable fortune in Russia, and would return with it to his own country, and that they would pursue their claims against him, though the debts were extinguished by the Russian prescription as aforesaid; and the said Charles Gascoigne entertaining hopes that he would be enabled, through the liberality or munificence of the Russian government, under which he had held important situations, and in which he had been useful, to make an amicable transaction with the said creditors; and being desirous of conciliation with them, although he was not, in any respect, bound in law to pay the debts or balances thereof appearing in the said sequestration, he did, of his own accord, make several offers to the said creditors; first, of the sum of L. 5000, and afterwards of the sum of L. 10,000 Sterling, out of funds then in his hands in Russia, on condition of receiving from the whole of the said creditors, without exception, an ample and full discharge of all their debts.'

The summons then states, 'That the said Charles Gascoigne died possessed of considerable property in Russia, real and personal, but charged with, and liable to the payment of large debts due to creditors, natives of that empire, and particularly subject to the result of a settlement of the above-mentioned accounts of long standing and of immense magnitude between the Emperor of Russia and him;



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' which, at this hour, are not settled; in consequence of which, according to the law and customs of Russia, said property cannot be affected by the creditors of the deceased, and far less by his foreign creditors, just or pretended, but remains in the absolute and uncontrolled disposal of his Imperial Majesty.' It then states the will of Mr Gascoigne, by which he named the Countess-dowager of Hadinton, his eldest daughter, his sole heir and executrix, who, upon his death, attempted an amicable settlement with the creditors under the sequestration in this country; but her attempts to compromise their claims were ineffectual: and it then concludes, ' that the following persons, original creditors, or heirs, executors, assignees, or otherwise representing, and in the place of, original creditors under the said sequestration awarded against the said Francis Garbett and Company and Charles Gascoigne as an individual,' enumerating a great number of the creditors claiming under the sequestration who should be called in this action: and then it seeks to have it ' found, decerned, and declared, by decree of our said Lords, that the said pursuers' (that is, Lady Hadinton and her husband) ' are not accountable in Scotland to all or any of the creditors, or pretended creditors, defenders, or any other persons whatsoever, for their intermissions with, and administration of the estate, means, and effects of the said deceased Charles Gascoigne, heritable or moveable, real or personal, acquired and left by him at his death in Russia, and subject to the laws of that empire:' and that it should be declared, ' that all and each of the debts due, or pretended to be due, to the persons above-named and designed, or their predecessors, authors, or cedents, were, at the time of the death of the said Charles Gascoigne, and are now, and in all time coming, null, void, and extinguished in law:—' that the said Ann Countess-dowager of Hadinton, and her said husband, pursuers, and all others, the family, children, and representatives of Mr Gascoigne, are discharged of the said debts or pretended debts; and that the creditors should desist from molesting them on account thereof in all time coming.

My Lords,—Defences were lodged to this libel; and afterwards the actions brought against Lady Hadinton were conjoined with the process brought by Lady Hadinton and her husband. The action came on before Lord Giffies on 11th July 1816, who ordered the pursuer and her husband ' to state in a special condescendence, in terms of the Act of Sederunt, the facts they aver and offer to instruct in support of the conclusions of the libel, particularly as to the residence of Mr Gascoigne in Russia, and the law of that country as applicable to this case; and when lodged, allows the same to be seen and answered.'

My Lords,—A condescendence was given in, in terms of this order, which was followed by answers for the appellants, in which they referred to an opinion they had just obtained from Mr Brockhausen, an eminent Counsel at St Petersburg, on the question of the Russian law;

and the respondents lodged a minute calling for an explanation of some parts of the answers, particularly of what related to the opinion of the Russian Counsel, and the appellants gave in an answer to that minute; and, on the 14th May 1818, the Lord Ordinary pronounced the following interlocutor:—‘The Lord Ordinary having this day and formerly heard the Counsel for the parties, appoints them to give in mutual memorials upon the question, Whether the present case is to be determined according to the law of Scotland, without regard to the law of Russia, and that within twenty days; and further, with a view of expediting the cause, before answer, appoints the parties to prepare a mutual case for the opinion of Russian Counsel, whether it would be held, in the circumstances of the case, that the debts of Mr Gascoigne claimed under the sequestration are extinguished by the Russian law of prescription?’

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In consequence of that, my Lords, a case was prepared by Mr Bell, advocate, approved of by the Lord Ordinary, and transmitted to Petersburg for the purpose of obtaining the opinion of Counsel there; and the opinion of two gentlemen, who are represented as being very eminent lawyers in Russia, was obtained, to which I shall have to call your Lordships’ attention presently. Upon these opinions being returned, and on the case coming on before the Court, they pronounced the interlocutor which I am about to read to your Lordships:—‘Upon the report of the Lord President, in the absence of Lord Gillies, and having advised the informations for the parties, the Lords repel the defences in the process of declarator and extinction brought at the instance of the Countess of Hadinton and her husband, and decern and declare in the terms of the conclusions of the libel in the said process; and in the several processes brought against the said Countess and her husband at the instance of Messrs Gibson and Balfour, and the late George Home of Paxton, the Lords sustain the defences, assoilzie the defenders from the conclusions of the several libels in the said processes, and decern accordingly; and find neither party liable to the other in the expenses of process in the said actions, or any of them.’

My Lords,—In consequence of this interlocutor of the Lords of Session, an appeal has been brought to your Lordships’ House; and, my Lords, I took the liberty of reading to your Lordships the conclusions of this summons of Lady Hadinton, because your Lordships perceive that, by the interlocutor which I have read, the Lords of Session decern and declare in terms of the conclusions of that libel. The consequence, therefore, of that interlocutor is this, that one of the terms of the conclusions of the libel being, that all the debts due to the creditors in Scotland, and who had come in and remained under sequestration, are declared to have been, not only at the time of the death of Mr Gascoigne, but at the time of the pronouncing that interlocutor, and in all time coming, null, void, and extinguished in law. That is so declared by the Court of Session.

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My Lords,—Several very important questions have arisen upon this judgment pronounced by the Court of Session:—1st, Upon the effect of the Russian law upon the debts contracted by Mr Gascoigne in Russia, which, indeed, is the principal question in the cause, and which branches itself into two or three questions; namely, first, as to the general effect of that law upon debts so contracted; next, upon the effect of a sequestration in preserving those debts against the law of prescription in Russia; and a third question also arose upon the effect of those communications, first, between Mr Gascoigne and his agent Mr Elphinstone and the trustee and creditors in Scotland, and afterwards on the part of Lady Hadinton herself, how far those communications and those offers would have the effect of interrupting that law of prescription which is said to arise in Russia, supposing the Russian law to be that by which the case is to be governed. My Lords, there were other questions subordinate in point of importance, but, at the same time, also not unworthy of attention, I mean with respect to those interlocutors, as affecting the actions of the creditors brought against Lady Hadinton; because your Lordships will perceive by this interlocutor, the defenders in those actions, Lady Hadinton and her husband, are absolved wholly from the conclusions of the several libels at the instance of those creditors; and consequently, if that interlocutor was right, those creditors are adjudged by that interlocutor to have no claim against her in respect of those bills of Stein which she received during the lifetime of Mr Gascoigne in Russia, and which were payable to her undoubtedly on account of her father.

Now, my Lords, with respect to the first proposition which is affirmed by this interlocutor, namely, that there being in Russia this law, that debts are not recoverable after they have been contracted ten years, and which is said by this interlocutor to have totally excluded those debts in Scotland, this question arises,—When debts are contracted in Scotland or in England, and which are recoverable in the courts of that country, and the debtor chuses to go and reside in a foreign country, by the law of which country debts cannot be recovered in that country after the period I have mentioned of ten years, whether the law of Russia, though it might be available by a party resident there, if he were sued in the courts of Russia, is to have the effect if that party should return to Scotland, or if property should subsequently accrue to him in Scotland, not merely of enabling him to oppose any claim made against him in the courts of Russia, but to have the effect of positively extinguishing and annulling those debts in Scotland? for that is the proposition which is adopted by this interlocutor, which affirms the terms of the conclusions of the libel. And I may here take the liberty of saying, that where a libel contains various conclusions,—though I know it is very often the practice of the Courts of Scotland, if they are of opinion one of those conclusions is supported, to decern generally in terms of the conclusions of the libel,—your Lordships see in this case, as in many others which I have seen

since I have had the honour of attending your Lordships' House, June 16. 1894. and before, the inconvenience which results from its being so stated, 'and doern and declare in terms of the conclusions of the libel,' if it had been confined to one, might have been correct in instances where it is not correct as to the whole.

My Lords,—Having in this case had the advantage of seeing the opinions delivered by the learned Judges in the Court below, undoubtedly I cannot but see that they have proceeded mainly upon that proposition, namely, that the effect of this prescription in Russia is to annul and extinguish, and prevent the recovery of those debts in Scotland. But, my Lords, though that undoubtedly is the effect of this interlocutor, and the result of the opinion of the Judges, yet I observe all of them consider, that if Mr Gascoigne himself, after having resided in Russia from the year 1786, when he went there, for more than ten years, had returned to Scotland, that he could not have availed himself in Scotland of this decennial prescription which had run in Russia. They all agree that, under the sequestration, the creditors, if he had returned, would have had a right to pursue him for the debts, and that it would not have been enough for him to have said, You cannot pursue me for those debts; for they would have said, Scotland is the place where those debts were contracted,—Scotland is the place where we are pursuing you; and you cannot protect yourself by the effect of a law of a foreign country, in which you have been residing for a time, to release you from the effect of the debts incurred in Scotland; but you are still answerable. All the Judges agree, that, if he had returned, the debts would have been recoverable against him. Lord Balgray, who first delivered his opinion, says, 'If Mr Gascoigne had returned to this country, and brought his effects with him, then you could have laid hold upon those effects, or you might have laid hold of his person under the sequestration.' Lord Balmuto, who followed him, says, 'If Mr Gascoigne had come to this country, then you would have applied the law of this country to him—you might have laid hold of his property or his person; but he never came to this country, he died in Russia; and therefore, I apprehend, the law of Russia must be applied.' My Lord President also states, 'But they, the creditors, say, If Mr Gascoigne had returned to this country, he could not have pleaded the Russian prescription; and therefore his heir cannot do so either. I think the creditors are right in the first point, that if Mr Gascoigne had come to this country he would have been liable. The creditors would have been entitled to say, that the debts were contracted here; you are now domiciled here, and we will attach your person for payment of these debts. We don't inquire, and we have no right to inquire, where you get funds to pay those debts: You may find those funds where you please.' And, my Lords, that I apprehend is a correct view of the subject, as applied to Mr Gascoigne himself; not only as it follows from the opinions of those learned persons, but a case was cited which had occurred in England, and it is admit-

June 16. 1824. ted, that the principles to be applied in that case would be equally applicable to an English or a Scotch case—I mean the case of *Smith v. Buchanan*, in the time of Lord Kenyon, in which he lays down the law upon that subject. That was an action brought for a debt for goods sold and delivered. The defendants pleaded, in discharge of the personal estate and effects of the defendants, that by a law of the state of Maryland, made on the 10th April 1787, intituled, ‘An Act respecting insolvent debtors,’ it was enacted, that any debtor for any sum above L.300, might apply by petition to the Chancellor of that State; and that, complying with the terms of that Act, he would be for ever discharged from the debts which he then owed. They then alleged, that after the making of that law, the defendants were joint debtors for more than L.900 in Maryland; that they petitioned the Chancellor, and offered to deliver up all their property to the use of their creditors, with the schedule and list of creditors thereunto annexed; that the Chancellor gave due notice to the creditors, and administered the oath to the defendants, appointed a trustee on behalf of the creditors, and directed the defendants to execute a deed to him of all their property, in trust, for their creditors; that thereupon the defendants did execute a deed to the trustee, and deliver to him all their property, who certified such delivery to the Chancellor; and thereupon the Chancellor, according to the Act, ordered, that the defendants should for ever thereafter be acquitted and discharged from all debts by them owing or contracted before the date of the deed. My Lords, to that it was replied, that the causes of action did not accrue in Maryland, but had arisen in England, within the kingdom of England, and that therefore they were not bound by this discharge of these defendants in Maryland, where they were then domiciled; for that England was the place where the debts were contracted, they were sued in England, and by the law of England, therefore, the question must be determined. My Lords, that replication was demurred to. It came on to be argued, and the defendants argued, that, by the law of Maryland, they were discharged of all their debts, and therefore were discharged from these. The case, however, was felt to be so clear, that the Counsel on the other side were stopped, and Lord Kenyon gave the judgment in these terms:—‘It is impossible to say that a contract made in one country is to be governed by the laws of another. It might as well be contended, that if the state of Maryland had enacted that no debts due from its own subjects to the subjects of England should be paid, the plaintiff would have been bound by it. This is the case of a contract lawfully made by a subject in this country, which he resorts to a court of justice to enforce; and the only answer given is, that a law has been made in a foreign country to discharge these defendants from their debts, on condition of their having relinquished all their property to their creditors. But how is that an answer to a subject of this country, suing on a lawful contract made here? How can it be pretended

‘ that he is bound by a condition to which he has given no assent, June 16. 1894.  
 ‘ either express or implied? It is true, that we so far give effect to  
 ‘ foreign laws of bankruptcy, as that assignees of bankrupts deriving  
 ‘ titles under foreign ordinances, are permitted to sue here for debts  
 ‘ due to the bankrupts’ estates; but that is because the right to per-  
 ‘ sonal property must be governed by the laws of that country where  
 ‘ the owner is domiciled.’—Then he goes on to mention the cases  
 which had occurred upon that subject.—My Lords, Mr Justice Law-  
 rence says, ‘ The point rests solely on the question, Whether the law  
 ‘ of Maryland can take away the right of a subject of this country to  
 ‘ sue upon a contract made here, and which is binding by our laws?  
 ‘ This cannot be pretended; and therefore the plaintiffs are entitled  
 ‘ to judgment.’

Your Lordships perceive the result of this judgment is, that the  
 interlocutor having decerned in the conclusions of the libel, one of  
 which conclusions is, that these debts are null and extinguished, if  
 to-morrow any property could be discovered in Scotland which had  
 belonged to Mr Gascoigne, those creditors are, by this interlocutor,  
 found to have no right whatever to pursue that property, because their  
 debts are absolutely null and extinguished. My Lords, it is admitted,  
 that if Mr Gascoigne had returned into Scotland,—nay more, if any  
 effects had come into Scotland, where they could have been attached,  
 they would have been liable to be attached under the sequestration.  
 It appears to me, therefore, that even on the principles adopted by the  
 learned Judges themselves, the interlocutor cannot be supported to  
 the extent to which it has been pronounced, that the debts are null  
 and extinguished. It is another question, to which I shall presently  
 call your Lordships’ attention, whether, though these debts are not  
 extinguished by the Russian law and proclamation, under the circum-  
 stances, Lady Hadinton, who is a Russian representative of this  
 gentleman, can be sued in Scotland in respect of that Russian repre-  
 sentation, in respect of effects received by her in Russia? That is a  
 very important question, and one which, it appears to me, has not  
 received all that consideration in the Court below to which it is en-  
 titled; but, my Lords, having stated thus much to your Lordships, I  
 trust I have shewn sufficiently, that it is impossible to support the in-  
 terlocutor that these debts are extinguished; for, taking the language  
 of Lord Kenyon, whether it was the common law, or any law they  
 have themselves introduced, it is impossible that, by a person’s removal  
 to Russia, or any other country where a different law prevails than  
 that in Scotland, he can discharge himself from those debts; but he  
 must, if he returns to that country, be liable to be sued, leaving it  
 open to him to avail himself of any defence which the law of Scotland  
 enables him to set up against those demands. Therefore, my Lords,  
 to the extent to which this interlocutor has gone, I apprehend it is  
 impossible to sustain it, for the reasons I have stated to your Lord-  
 ships.

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But then, my Lords, comes that which is an extremely important and difficult question; supposing these debts, though not barred in Scotland, yet were not recoverable in Russia against Mr Charles Gascoigne, whether Lady Hadinton, having succeeded to his property by the law of Russia, that property being in Russia, can be sued in Scotland for those debts, which, if sued for in Russia, could not have been recovered against him? Now, my Lords, this point, as I have stated to your Lordships, appears to me not to have been sufficiently considered by the Court of Session, they having come to the conclusion, that although those debts were not barred as against Mr Gascoigne himself if he had returned to Scotland, or brought effects there, yet they were utterly extinguished as against his representatives. They have, of course, coming to that conclusion, at once pronounced in favour of Lady Hadinton in the action of declarator; and at once, without further consideration, absolved Lady Hadinton and her husband from the actions brought against her by some of the creditors; although in that action it was contended, that she had acquired property in Scotland, during the lifetime of her father, which was liable to her father's debts, declaring that those debts were null and extinguished, and at once extinguished and void in respect of recovery against her; and, of course, she was absolved from the actions by that declaration.

My Lords,—It appears to me that another question, submitted to the Russian lawyers, has not yet been answered by them so satisfactorily as to enable your Lordships at once to affirm this interlocutor, proceeding upon the ground of those opinions. I observe even the learned Judges themselves feel, that those opinions are not sufficiently precise upon the subject, and I am not at all surprised that they should feel so. I will shortly call your Lordships' attention to the case which was stated to these lawyers, and will read to your Lordships their opinion. One question certainly was, supposing the law of decennial prescription in Russia to apply to debts generally, whether the effect of a Scotch sequestration was not, to keep alive the debts proved under that sequestration, and therefore to prevent the effect of the law of Russia,—that depends very much upon the effect of a Scotch sequestration. The Scotch sequestration differs in this respect from the English commission of bankrupt: The effect of an English commission of bankrupt is, that by the assignment to the assignees, not only the personal property of the bankrupt at the time, but all his future personal property, passes to the assignees; so that the assignees under an English proceeding, without further proceedings, may recover, in their own names, any personal property subsequently acquired by the bankrupt. A Scotch sequestration has no such effect; it merely passes the property the person possessed at the time of the sequestration; and if he acquires any personal property, it is necessary, in order to give the trustees possession of it, to have a supplemental sequestration. But the effect of a Scotch sequestration, I apprehend, is, that it prevents time running against those debts: indeed, there is an express statute,

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particularly the 54th of the late King, which follows the former provisions upon this subject, by which it is enacted, by the 52d section, 'That the making production of the ground of debt or certified account, with the oath of verity aforesaid, in the hands of the interim factor, Sheriff-clerk, or trustee, or in the Court of Session, shall have the same effect as to interrupting prescription of every kind, from the period of such production, as if a proper action had been raised on the said grounds of debt against the bankrupt and against the trustee.' Now, therefore, although the trustee under the Scotch sequestration could not, without a supplemental sequestration, recover the effects subsequently acquired, I apprehend the creditors have still a right to pursue the bankrupt for the balance of their debts, as has been done in this case by Gibson and Balfour, and by Mr Home as factor for Douglas, Heron and Company; for they sue against Lady Hadinton and her husband for the balance due to them on account of the debts they have proved under the sequestration. It was therefore very important, in presenting this case to a Russian lawyer, in order to determine how the Russian law applied to this case, that as clear an explanation as possible should be given to that lawyer of the effect of the Scotch sequestration.

My Lords,—The case which is stated for the opinion of Russian Counsel is rather short. It states the effect of this partnership by Sir Charles Gascoigne and Mr Garbett, and then it states, that 'certain proceedings took place in Scotland, under the bankrupt laws of that country, against the Company, and against Sir Charles Gascoigne as a partner of the Company, for obtaining payment of the debts due by them. It is contested between the parties, whether those proceedings have the effect of interrupting or excluding prescription, which, by the law of Scotland, after a certain number of years, extinguishes or cuts off the claims of creditors for payment of debts on which no proceedings have been taken sufficient to bar such prescription; and it will be necessary therefore, that, in making your answer to the case, you alternately suppose, on the one hand, that the debts would be held as cut off in Scotland by prescription, were Sir Charles Gascoigne alive, and in that country; or, on the other, that the debts are still in Scotland subsisting debts, for which Sir Charles Gascoigne, if alive, would be liable; or his property, or those who succeed to him in it, now that he is dead, might be affected by the law of Scotland.' Then it goes on to state, that 'the debts claimed in Scotland against the Company, and against Sir Charles Gascoigne, amounted originally to L. 129,447; and dividends have at several times been paid to the amount of 11s. 3d. in the pound upon those debts, leaving a large balance still due. Sir Charles Gascoigne, after having, till the year 1786, acted as manager for his creditors, left Scotland in that year and went to Russia. He was there naturalized. He died in Russia on 20th July 1806.'—That 'Sir Charles Gascoigne's residence in Russia was well known to all or many of his creditors in Scotland;



Jan. 16. 1824. 'but no judicial demand was made against him in Russia by his British creditors, from the moment of his landing in that empire to his death.'—That 'during all this time, and down to the present day, the proceedings in bankruptcy have been going on in Scotland, where funds have been gradually collected and distributed to the extent already mentioned; but no final distribution has yet taken place. About the year 1799 or 1800, Sir Charles Gascoigne appears to have become desirous of obtaining a discharge from his British creditors, of all claims which might be open to them against his person, or against his recent acquisitions; and certain overtures were made at his desire, by his friends, to compound for such a discharge by the offer of a sum of money, but without the acknowledgment of any specific debt. The correspondence in which these overtures are mentioned and discussed, is here referred to, consisting of the first six numbers of the annexed letters. This negotiation was never concluded.'

It then states the will of Sir Charles Gascoigne, made in Russia, and that 'all his estate and effects, acquired since the bankruptcy took place in Scotland, lay in Russia, which was the place of his domicile at his death. Lady Hadinton accordingly entered into the administration of her father's effects, according to the forms observed in Russia. She became desirous, as her father had been, to obtain a discharge from the British creditors, of any claim which they might have upon her father's property, so acquired in Russia; and a correspondence and negotiation took place between persons acting on her behalf and the trustee for the creditors. That correspondence is also hereunto annexed.'—'This negotiation also proved ineffectual; and an action has been commenced in the Court of Session in Scotland, on the part of Lady Hadinton, for having it found and declared, (according to a form of action known in Scotland), that Lady Hadinton is not accountable in Scotland, to all or any of her father's creditors in Britain, for any estate or effects which may have been derived to her from her father's death in Russia, as being property situated there, and subject to the laws of that empire; and generally, that the debts that had been contracted by him in Scotland or Britain, before he left Scotland, are entirely cut off and extinguished. It has in particular been maintained, that by the Russian law, if no demand, process, or action for civil debt, have been instituted in Russia during ten years from the date of the origin of the claim, or if any legal demand or action, though once instituted there within that period, has not been persisted in for a period of ten years, the right of action upon such debt is annulled.'

Then, my Lords, these are the questions. 'First, Without having any regard to the proceedings in Scotland, or the foreign origin of the debts, be pleased to say, Whether, by the law of Russia, a person who takes, under the will of a father, the estate or effects which belonged to him, does thereby become responsible in Russia for his debts? And if so, whether for his foreign debts, as well as for those

‘ due in Russia? Whether there is any difference between such responsibility, supposing it to be incurred, and the responsibility of the original party, either as to endurance or otherwise? Whether there be, in the law of Russia, any limitation or prescription, by which the right of a creditor to demand his debt, either from the debtor himself or from his heir, is discharged or cut off in consequence of the lapse of time, ten years, or any other space of time? And be pleased to explain, Whether, by any form of judicial or extrajudicial demand, this discharge, from lapse of time, may be interrupted; and what the distinguishing character of such interruption is? Whether, if any judicial demand has been made in Russia, and the creditor has ceased to persist in that demand, the debt would be discharged by prescription? and what period of cessation from such action or demand, is requisite to produce this effect?’—Then, ‘*secondly*, Taking the supposition that, by the law of Scotland, the debt would be discharged by prescription, and that the proceedings in bankruptcy would have no effect in preventing the rule of prescription from applying, be pleased to say, Whether the creditor would still be admitted to make his demand in Russia against the original debtor, if alive? or against his heir taking his succession after his death? What would be the effect, in the Russian tribunals, of the correspondence between the parties, in reviving a responsibility which otherwise would have been held as discharged?’

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Then there was a third question. ‘Taking the supposition, that the proceedings in bankruptcy in Scotland, if not overruled or counteracted by the Russian law of prescription, have kept the debt alive there, so that it might be demanded from the original debtor, if still in life and in Scotland, or from his heir, being in that country, and having effects derived from the will of the original debtor, be pleased to say, Whether would the debt be demandable also in Russia, either from the original debtor, if alive, or from his heir in possession of his estate and effects? or would any Russian law of prescription be held to discharge the person of the debtor, or his effects, from responsibility for the debt?’ And then, ‘Would the correspondence already referred to, have any effect in establishing in the Russian tribunals a responsibility not otherwise incurred?’

This case was submitted to two gentlemen, one of the name of Hartmann, and another of the name of Brockhausen; and Mr Hartmann states the law of Russia to be as I am now about to read to your Lordships. ‘As soon as the heir takes possession of the property of the deceased, he becomes responsible for the debts and other obligations of the deceased, not only to the whole amount of what he has inherited, but as far as his own personal means will extend; and that responsibility attaches to debts both in and out of Russia.’—‘There is no difference between such a responsibility and that of a first debtor, either by its duration or otherwise.’ Then as to the prescription, he says, that ‘the 4th section of the Imperial Manifest of the 28th June

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' 1787, fixes the prescription of ten years for every process whatever: and, after the expiration of this period, the right of a creditor to demand his debt, either from the first debtor or from his heirs, becomes completely null and void; and this annihilation of the right, after the lapse of ten years, can neither be prevented nor interrupted by judicial or extrajudicial forms. In the event of a judicial demand having been made, and that the creditor has ceased to persist in it, ten years must elapse after that cessation, to produce the effect of prescription.' Then he says, ' If, by the laws of Scotland, a debt becomes annihilated by prescription, the creditor, in that case, cannot make his demand, in Russia, against the first debtor, or against the person who has inherited from him after his death, supposing the time fixed for the prescription in Scotland to be also at least ten years.' Then he says, with respect to the correspondence—' It is true that, according to the military regulation, admitted in all civil causes, the correspondence which has existed between the parties interested may give rise to motives for entering upon a new process; but as that regulation, as well as the ordinance of 5th November 1728, are only expressed in general terms upon the forms of proceedings, and as no positive law exists, declaring that a private or particular correspondence, entered upon between the debtor or his heirs with the creditors after the prescription has been in operation, might oblige that debtor to pay his creditors a debt already superannuated, it is impossible to guarantee the fortunate result of such a process. Still it is true, that there exists similar instances where the Supreme Ruling Senate has pronounced in favour of the creditors; but those decisions have only been given in special cases, and they have not been promulgated as established laws. Further, no precedents can ever be considered as laws. In short, in entering upon such a process, the adverse party must be upon the spot; and the duration of such a litigation is not only very long, but subject to considerable expense.' Then he says, ' Supposing the bankrupt proceedings in Scotland have had the effect of perpetuating and continuing the debt, and that there had been a formal judgment against the debtor, of a date within the period of ten years, then the creditors might demand in Russia the payment from the first debtor, in case he was alive, or, if he was dead, from his heirs.' Then he says, that ' the correspondence which has subsisted between the parties interested may contribute to establish, before the Russian tribunals, a responsibility, as it has been before observed.' I think your Lordships will perceive, that these answers are not conclusive at all of the questions between the parties. They are hypothetical answers, and no determinate answer is given on the effect of the Scotch sequestration; and indeed I am not surprised at that, considering the manner in which the question on the Scotch sequestration was proposed to that learned person.

Mr Brockhausen agrees, as to the effect of Russian law, with the opinion given by Mr Hartmann. Then he says, ' Any debt not judi-

'cially claimed, or process, although instituted, and not followed up June 16. 1894.  
'during a lapse of ten years, is annulled and condemned to eternal  
'oblivion by the law alone, without intervention of the debtor.—Manifest  
'of the year 1787, 28th June. But when there is no interval of  
'ten years from one petition to another, or of any other proceeding  
'judicially verified, the reclamation or process remains in full force.'  
So that your Lordships perceive that Mr Brockhausen is of opinion;  
as indeed is to be collected from the opinions of the other gentleman;  
that if a proceeding had been instituted in Russia, for the recovery of  
a debt, which was continued there, the ten years' prescription does  
not run in favour of the debtor, until the cessation of that civil pro-  
ceeding; and therefore, my Lords, the great question in this case  
would be, (supposing it was to be determined by the law of Russia);  
Whether the effect of a Scotch sequestration is not to keep alive, in  
the nature of a legal proceeding, the right of the creditors until they  
are fully discharged, or until the party himself has obtained a dis-  
charge under the sequestration?

He says, in answer to the fourth question, 'The debtor may produce  
'the act of prescription the day following the last day of the expiration  
'of the tenth year.' Then he says, 'According to the Manifest of  
'1787, no reclamation would be any longer admitted, either against  
'the debtor, if in life, or against his heirs representing him after his  
'death. It would be equally the same if there was a prescription of a  
'foreign tribunal.' Then he says, with respect to the correspondence,  
those negotiations which had taken place for the purpose of relieving  
Mr Gascoigne from the effect of those debts,—'The correspondence  
'would necessarily revive motives to enter upon a new process, if ten  
'years have not elapsed from its date. If the debts were recognized  
'as valid by a foreign tribunal, and that there was a formal judgment  
'against the debtor, of a date within the period of ten years, then a  
'judicial execution against the property of the debtor, or of his heirs,  
'would be admitted in its full vigour; and there exists no law against  
'it. The correspondence, written or signed by the hand of the debtor  
'or of his heirs, may serve as a motive for establishing in Russia a new  
'process in due form, according to the ordinance of 1723, 5th Novem-  
'ber; but the correspondence of a third person cannot be sustained  
'as proof, unless it is accompanied by a full power; so that to enter  
'upon such a process, it would be necessary for the adverse party  
'to be upon the spot.—N. B. The progress of such process is very  
'slow, and the expense considerable.'

My Lords,—Those opinions were sent back by a gentleman of the  
name of Cramer, whose letter is added to the Appendix, in which he  
apologizes for the delay. It appears that the legal gentlemen in Rus-  
sia are not more expeditious in giving opinions than the legal gentle-  
man in this country. The opinions were laid before the gentle-  
men in Russia in the month of April, and they got no answer till the

June 16. 1824. 'month of September. He says, 'After receipt and perusal of  
'the Memorial intrusted to my care, I applied for opinions to Mr  
'Brockhausen and Mr Hartmann, both lawyers of first standing  
'here, and possessed of foreign languages, requesting an immediate  
'solution. This, however, I could not obtain, after all my plaguing  
'and teasing them, until of late, when I found their opinions in part  
'entirely opposite to each other, which would have embarrassed any  
'of the parties on your side of the water. I then resorted to new con-  
'ferences to discuss the matter; and the lawyers have now given their  
'opinions, which I enclose, and hope you will find agree, pretty much  
'grounded upon our laws. The only point which, in my humble opi-  
'nion, is the chief point of inquiry, is not exactly ascertained, and even  
'in conversation yielded to by both lawyers. It is ad quest. II. §.  
'How far private correspondence, during the lapse of time prescribed  
'by our laws (say ten years) is in favour of one of the parties con-  
'tending to recommence and re-establish a suit at law.' Then he  
makes some remarks upon those opinions.

My Lords,—I must confess that, attending to those opinions and to the judgment which has been pronounced below, I do not feel myself in a situation to offer to your Lordships any decided opinion upon the effect of this law of Russia, or the answers given by these gentlemen; and I should therefore propose to your Lordships, that this part of the cause should be remitted to the Court of Scotland, to obtain, if possible, a more decided opinion on the effect of a Scotch sequestration on property sued for in the Courts of Russia. It appears to me, a case should be framed, stating positively the effect of a Scotch sequestration in Scotland, as to interrupting prescription in Scotland, and the effect of that proceeding in the nature of a judicial proceeding in respect of preserving those debts; and upon such a case one cannot but entertain a hope, that a more satisfactory opinion may be obtained from the Russian lawyers upon that subject. So also upon the effect of the correspondence. Some of the learned Judges conceive, that that correspondence ought not to be received, because it was in the nature of an offer of compromise, which in the law of Scotland is wholly disregarded; but that does not appear to be the effect of the opinion of the Russian lawyers. They seem to be of opinion, that in Russia the effect of that correspondence would be to interrupt prescription, which would otherwise run against debts; and with respect to the actions brought against creditors, it appears to me, that the Court below, deciding upon that point, in which I wholly differ from them, namely, that those debts are wholly extinguished in Scotland, have contented themselves, on coming to that conclusion, in dismissing the actions against Lady Hadinton. In those actions a very different question arises, not only how far she, as a Russian representative, is subject to those debts, but whether, in the lifetime of her father, acquiring property in Scotland in trust for her father, that pro-

perty is not liable to those debts. That question is not decided at all. June. 16. 1884. It may turn out on an investigation of this case, (but on that point it is impossible to give an opinion without knowing how the fact is), that this property may not be liable to those debts; but when I see it stated, that if property had been acquired by Mr Gascoigne in Scotland that would have been liable to those debts, it is most material to ascertain whether this property, which it is alleged that she received in trust for her father in Scotland, may not, independently of those nice questions arising on the Russian law, be still liable in those actions brought by the persons to whom I have referred your Lordships, Gibbon and Balfour, and Mr Home. These questions have never been solemnly discussed in the Court below: They say, In our opinion, those debts, though contracted in Scotland, are in Scotland absolutely null and extinguished, and cannot be enforced by those creditors against Lady Hadinton; and if not against Lady Hadinton, not against any other person: they say, Those actions by those creditors cannot be sustained, because their debts are extinguished, and because Lady Hadinton cannot therefore be liable to the payment of those debts, or to answer for this money received under those bills.

My Lords,—Unfortunately, as your Lordships must have collected, from what I have stated, the questions in this case are questions, if they shall arise on the Russian law, of great nicety and great difficulty. My Lords, I cannot help throwing out this, that I think the question as between the creditors and Lady Hadinton,—she deriving her title to this property as a Russian representative,—must be decided as between the creditors and her, as it would be decided between them and a Russian, if a Russian had arrived in Scotland. I throw out that as the present impression on my mind, not as a conclusive opinion, but as one deserving great consideration. If, on the answer to those questions, it shall appear that, by the law of Russia, those debts could not be recovered there, because a person in Russia, acquiring right by Russian law, would in Russia be exempted from the payment of those debts, it would be difficult to say how, if this Russian came to Scotland, he would be affected in Scotland, he being relieved by the law of Russia from those debts; and if that be the law in the case of a Russian, it is difficult to say how it can be different, if it is in the case of a Scotch lady. I have thrown this out, (thinking that probably what I have stated to your Lordships may be conveyed to the learned Judges in the Courts of Scotland), as a most important point to be considered; but, feeling as I do, and, if your Lordships shall concur with me in that view, that part of this interlocutor cannot stand, namely, that part of the interlocutor which has found these debts null and extinguished; it appearing to me, that the Court below has proceeded mainly on that ground, not only in the action of declarator, but in those actions which the creditors have brought against her, and which are conjoined in this process, I shall propose that your Lordships shall find, first, that the debts due to the persons named in the summons of

June 16. 1824. the respondents were not, at the death of Sir Charles Gascoigne, nor are now, null, void, or extinguished at law. I should propose, next, that the cause should be remitted back to the Court of Session in Scotland to review generally the interlocutor complained of; and, in reviewing the same, that the Court should especially consider, whether, by the law of Russia, due regard being had to the proceeding in the sequestration, and its effect in preserving the rights of the creditors till their debts are fully satisfied, and to the communications between the said Charles Gascoigne, and also between the said Countess, and the trustee under the said sequestration, the debts of the said creditors could now be enforced in Russia against the representative of the said Charles Gascoigne there; and for that purpose, the Court should obtain further opinions of Russian lawyers, upon a more full and accurate statement of the nature and effect of the process of sequestration, and of the aforesaid communication: and further, in the several processes brought against the said Countess and her husband, at the instance of Messrs Gibson and Balfour, and the late Mr Home of Paxton, particularly to consider the time and occasion of Stein's bills being made payable to the said Countess, and whether the said bills, or the sums recovered upon them, can or cannot be considered as effects of the said Charles Gascoigne, received by the said Countess in Scotland; and whether, if they can be considered as the effects of the said Charles Gascoigne received by the said Countess in Scotland, she is on that account liable to any, and what extent, to the said pursuers in those processes, or any of them; and, after reviewing the said interlocutor, with these findings and directions, that the Court shall do and decern as to them shall seem meet and just.

My Lords,—I ought to apologize to your Lordships for the time I have taken in stating to your Lordships the nature of this case, and the observations which have occurred to me upon it; but really, after paying great attention to this case, I could not, consistently with justice to the parties, with a view to the findings and judgment I now move your Lordships to pronounce, refrain from making these observations, thinking that probably they may tend to assist in the further consideration of this case in the Court of Scotland. The point is undoubtedly one of great difficulty and great novelty, for I have not been able to find any case bearing precisely upon this question; and therefore it was, that I have been induced thus long to detain your Lordships.

*Respondent's Authorities.*—Huber de Conf. Leg.; 1. Voet, 8. 30. and 44. 3. 12.; Randall, July 12. 1768, (4520.); Kerr, February 20. 1771, (4522.); Campbell, November 23. 1813; (F. C.); Delvalle, March 9. 1786, (4525.); 1. Bell, 565.

SPOTTISWOODE and ROBERTSON—J. RICHARDSON,—Solicitors.

(Ap. Ca. No. 66.)

CHARLES GREENHILL, Trustee on the Sequestrated Estate of  
JAMES FORD, Appellant.—*Moncreiff—Buchanan.* No. 51.

Mrs CATHERINE AITKEN, Respondent.—*Cranstoun—Greenshields.*

*Husband and Wife—Divorce.*—A wife having brought an action of divorce, on the ground of adultery, against her husband, which was opposed by the trustee for his creditors, so far as related to the pecuniary consequences; and the wife having emitted an oath de calumnia, and denied collusion; and the trustee having offered a proof of collusion; and the guilt of the husband having been established;—Held, (affirming the judgment of the Commissaries and the Court of Session), 1. That the proof offered by the trustee, after the path of calumny, was incompetent; and, 2. That the wife was entitled to decree of divorce in the usual terms, without any qualification as to the right of the creditors of the husband.

In 1804 Mr Ford, merchant in Montrose, was married to the respondent, Miss Catharine Aitken, daughter of Mr Charles Aitken, merchant in Santa Cruz. She was possessed of a considerable fortune, and had the prospect of acquiring a large addition to it on the death of her two uncles, John and George Aitken. An antenuptial contract of marriage was therefore executed, by which, in consideration of a tocher of L.10,000, Mr Ford became bound to secure to her certain money provisions; and, on the other hand, she assigned 'to and in favour of herself and the said James Ford, in conjunct fee and liferent, for the said James Ford's liferent use allanarly, and the children to be procreated of the said intended marriage in fee; whom failing, to the said Miss Catharine Aitken, her own nearest heirs and assignees, all and sundry whatsoever means and estate, heritable or moveable, personal or real, which she may happen to acquire by succession, gift, legacy, donation, or otherwise, during the subsistence of the said intended marriage.' The parties lived for many years together in perfect harmony, and had a numerous family. In 1814 and 1815 George and John Aitken, Mrs Ford's uncles, died unmarried, and the former intestate. John left a settlement, bequeathing his whole property to Mrs Ford; and although this deed was reduced quoad the heritage, yet she was entitled to a large personal succession; and as one of the next of kin of her uncle George, she had right to about L.5000. In 1817 Mr Ford became bankrupt; and his estates having been sequestrated on the 27th of February, the appellant, Mr Greenhill, was appointed trustee. A short time prior to this event, a young woman of the name of Charlotte L. Sutherland had been received into the family as governess of

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June 16. 1824. the children. In the course of the same month the respondent proceeded to London by herself, on business (as she alleged) connected with the construction of a will before Doctors' Commons, in which she and her children had important interests. During her absence the lease and furniture of the house in which the family resided were sold by the appellant. In consequence of this, she stated, that she was obliged to look out for a new place of residence; and accordingly she took a house at Durham, to which the children were brought from Montrose by Miss Sutherland, who was thereupon dismissed, as, under existing pecuniary circumstances, her services required to be dispensed with. In the meanwhile it appeared that an adulterous intercourse had been carried on between Mr Ford and Miss Sutherland in the house in Scotland and its neighbourhood. After the family had been ejected, he went to Paris, and was there joined by Miss Sutherland. They there represented themselves as uncle and niece,—occupied contiguous sleeping apartments, separated only by a partition, but which had a door of communication. Some time thereafter Mr Ford returned from France, and came to Durham, where he was received by the respondent, who stated that she was entirely ignorant of the criminal connexion, and supposed that he had been induced to go abroad to avoid the diligence of his Scottish creditors. Her suspicions were, however, excited from having accidentally discovered that he called for letters at the post-office under the name of Cunningham, and represented himself as residing in a street different from that in which the house of the family was situated. About the same time she found an open letter in his bed-room, addressed to him as Mr Cunningham, which was evidently in the handwriting of Miss Sutherland, but which was subscribed by a feigned name, and was dated from Fahan in Ireland, to which place it appeared she had gone in consequence of having contrived to be introduced into the Bishop of Derry's house as governess. At this time the family consisted of ten children, one of whom was dangerously ill; and as the respondent was desirous to disconnect herself from her husband without his knowledge, and to take her children along with her, she alleged that she was obliged to have recourse to a stratagem; that with this view she sent part of the family to the country; and having ascertained that he was to dine from home on a certain day, she made arrangements for carrying off the children who were in the house, and those who were in the country meeting her on the road. She accordingly, upon the afternoon of the day when he dined

abroad, departed from Durham, met her children on the road, and having travelled all night, arrived next morning in Edinburgh. No communication afterwards took place between her and him; and about three months thereafter she raised a summons of divorce before the Commissaries, in which she set forth, that 'for a considerable time past, and at least for the two last years, the said James Ford had totally alienated his affection from the private complainer, and not only treated her with great disrespect, harshness, and severity, but at many different times and places during the said period, he, the said James Ford, had given himself up to adulterous practices, fellowship, and correspondence with wicked women, one or more, known not to be the pursuer, his wife; and to the having adulterous intercourse and dealing with the said women, one or more, in the house of the pursuer and the said James Ford, at Bromley, near Montrose, and in the woods and fields, or other places, in the neighbourhood thereof, in Paris, and in Ireland, or elsewhere abroad, and other places to the pursuer as yet unknown: And more particularly, the said James Ford having formed an intimacy with a young woman of the name of Charlotte L. Sutherland, who for some time lived in family with the pursuer and her said husband as governess to their children at Bromley aforesaid, he committed adultery with her in that house, and in the woods and fields and other places in the neighbourhood thereof, on many different occasions, during one or more of the days or nights in the months of March, April, May, June, and July 1817, and more particularly in the two last mentioned months, during which the private pursuer had occasion to be absent: Also in Paris, to which place or elsewhere abroad, the said woman, known not to be the private pursuer, accompanied or followed the said James Ford; and there the said James Ford and the said Charlotte L. Sutherland, or other woman known not to be the pursuer, lived and cohabited together as husband and wife, under the name of Mr and Mrs Cunningham, or other feigned name, for several months, and particularly during the months of February, March, and April 1818, when, or about which time, from want of funds to continue their residence longer there, or other cause, they separated.' She then concluded for decree of divorce against Mr Ford, and to have it found and declared, 'That the said defender has forfeited all his rights by contract of marriage, jure mariti, or otherwise, the same as if he were naturally dead; and that the private pursuer has right to all her provisions, both legal and

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June 16. 1894. 'conventional.' No appearance was made by Ford; but the appellant, as trustee for his creditors, lodged defences, in which he stated,—

1. That there was no evidence of the charges of adultery.

2. That the process was a collusive scheme concerted between the respondent and her husband to defeat the vested rights of the creditors under the contract of marriage. And,

Lastly, That there were sufficient grounds for the plea of remission injuriae.

She was thereupon appointed to emit an oath of calumny, which she accordingly did, and denied the allegation of collusion. The appellant attended on this occasion by his counsel, and put special questions, which were answered by her. She was then judicially examined, and was particularly interrogated in regard to her knowledge of her husband's guilt; but she pointedly denied that she had any suspicion of it until the discovery at Durham. Thereafter she was ordered to lodge a concordance in support of her libel, which she accordingly did, and in which she stated,—

' 1. That the parties in this cause were regularly married in 1804, and afterwards cohabited together as husband and wife, and had several children.

' 2. That, in the beginning of the year 1817, when the parties resided at Bromley, near Montrose, the defender formed a criminal attachment to Charlotte L. Sutherland, who lived at Bromley as governess to the children, and he committed adultery with her in the house of Bromley, and in the woods and fields in the neighbourhood thereof, on many different occasions, in the months of March, April, May, June, and July, in the year 1817, and particularly during the two last-mentioned months, in which the pursuer was necessarily absent from home. The defender and the said Charlotte L. Sutherland were repeatedly shut up in her bed-room together for a considerable time, with the door thereof locked or bolted on them. They were overheard, while in the said bed-room, whispering to each other; and at times came out of it with their dress in a disordered state, the defender buttoning up his clothes. The bed, after they had left the said room, was likewise in a disordered state. During the pursuer's absence from Bromley, the defender and the said Charlotte L. Sutherland were frequently together in the school-room, and were there seen sitting on the same chair, he with his arm round her waist, and kissing her. He was sometimes seen or heard leaving her bed-room during the

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‘ night, and going to his own apartment; and the said Charlotte L. Sutherland’s bed had repeatedly, in the mornings, the appearance of two persons having lain in it. The said Charlotte L. Sutherland was sometimes seen in her bed-room, which is a small apartment off the school-room, undressed, and going to bed, while the defender was in the school-room undressed, or undressing for bed. At other times, the defender’s candlestick and slippers were seen in the said Charlotte L. Sutherland’s bed-room, at her bed-side. On many occasions, during the same period, the defender and the said Charlotte L. Sutherland were seen walking together in the shrubbery and plantations at Brotmley, arm-in-arm, and he sometimes with his arm round her waist and neck, and kissing her; and they occasionally remained in retired parts of the said plantation for a considerable time together. Other acts of indecency or gross impropriety between the defender and the said Charlotte L. Sutherland will also be proved, for instructing that an adulterous intercourse subsisted between the defender and the said Charlotte L. Sutherland.

‘ 3. That afterwards the defender and the said Charlotte L. Sutherland, at least a female and not the pursuer, went to Paris, and resided there during the months of October, November, and December 1817, and of January, February, March, and April in the year 1818, lodging and sleeping at different hotels, and particularly in the Hotel Valois, Rue de Richelieu, No. 17. kept by Madame Marcel; in the Hotel des Hautes Alpes, Rue de Richelieu, No. 12. kept by Madame Deribois; and in the Hotel d’Arbois, Rue Traversiere, No. 32. kept by M. Barbieri. In these hotels they represented themselves as uncle and niece, but occupied contiguous sleeping apartments—the only entry to the bed-room of the said Charlotte L. Sutherland, or other female, being through the bed-room of the defender, to which her bed-room was immediately adjoining, the two apartments being separated only by a partition, with a door of communication in it to the two rooms; and in the said hotels they repeatedly were guilty of adultery together.

‘ 4. That subsequent to the period last mentioned, the defender and the said Charlotte L. Sutherland, or other female as aforesaid, separated in France, and she obtained the situation of governess in a family residing at Fahan, near Londonderry, in Ireland. While she resided at the said place, a written correspondence was carried on between her and the defender

June 16. 1824. ' under fictitious names; and, in particular, she wrote to him  
' under the address of " Mr Cunningham, care of the Post-  
' Office, Durham, England;" and the said letters contained  
' various passages instructing that an adulterous intercourse sub-  
' sisted between the defender and the said Charlotte L. Suther-  
' land, or other female as aforesaid.

' 5. That in October or November last, the defender visited  
' her at Fahan, and resided several days in the house in which  
' she lived, and repeated his adulterous intercourse with her.'

Of this condescendence she was allowed a proof, which was taken, and by which the criminal intercourse, and the pregnancy of Miss Sutherland, were clearly established. A condescendence was thereupon ordered to be lodged by the appellant as to the plea of remissio injuriæ, (this having been superseded by consent of parties till after the proof of the adultery had been concluded); and in that condescendence he offered to prove,—

' First, That the pursuer, Mrs Ford, deserted her husband's  
' house at Bromley, near Montrose, in the month of February  
' or March 1817, soon after his bankruptcy, and went to Lon-  
' don, leaving her family of ten children under the charge of  
' her husband and Miss Sutherland; and notwithstanding that  
' she had expressed previously her knowledge and suspicion of  
' an adulterous intercourse being carried on betwixt her hus-  
' band and Miss Sutherland.

' Secondly, That the pursuer thereafter corresponded with Miss  
' Sutherland, and afterwards invited her to join the pursuer at  
' Durham, where she had subsequently taken up her residence.

' Third, That afterwards, and about the month of July or  
' August 1818, and subsequent to the acts of adultery charged,  
' the pursuer formed the resolution of again living with her hus-  
' band, Mr Ford; and accordingly received him into her house  
' at Durham, and she exerted herself, by every means within  
' her power, to obtain him introduced into the best society of  
' that city. That they lived together as man and wife for the  
' period of six weeks and upwards, and visited many respectable  
' families; and the pursuer expressed her displeasure when any  
' thing occurred to induce her to believe that her husband had  
' been treated with neglect in consequence of unfavourable re-  
' ports against him, on occasion of such visits, or at public  
' places.

' Fourth, That the pursuer and Mr Ford, after living together  
' as man and wife at Durham for the period of more than six  
' weeks after the acts of adultery charged, again formed the

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‘ resolution of separating; and, as the pursuer is possessed of a large fortune, unattachable by the creditors of her husband, but the liferent of which belongs to Mr Ford’s creditors; in terms of the contract of marriage with the pursuer, the parties concerted a collusive plan, for the purpose of defeating the just rights of the creditors in the said liferent rights; and accordingly the pursuer became bound to pay an yearly annuity of £200, less or more, to Mr Ford, upon which he agreed to live separate from the pursuer; and afterwards the present action was brought.

‘ *Fifth*, That notwithstanding the alleged detection, by means of the anonymous letters addressed to Mr Cunningham, and produced in process, of an adulterous intercourse carried on between Mr Ford and Miss Sutherland, the pursuer and Mr Ford continued to live together as man and wife in their house at Durham, for the period of at least one or two weeks after the said letters had come to the knowledge of the pursuer.

‘ *Sixth*, That Mr Ford continued to reside in the pursuer’s house at Durham for some time after she, the pursuer, had quitted it; and he remained till part of the annuity was paid to him by the pursuer or her agents, by her authority and out of her proper funds, and which said advance was subsequently repaid by the pursuer to the person by whom it had been advanced.’

The Commissaries, on advising the proof with this condemnation, found, that Ford had been guilty of adultery with Charlotte Sutherland; ‘ that the allegations stated in the condemnation were not relevant to infer remissio injuriæ; and therefore repelled the defence founded thereon, and divorced and separated, and found and declared in terms of the conclusions of the libel.’

Against this judgment the appellant presented two petitions, in which he stated, that he ‘ did not oppose decree of divorce being pronounced in favour of the pursuer, provided the rights of the creditors were preserved entire;’ but contended, that as the acts of adultery which had been established had taken place subsequent to the sequestration, their rights could not be affected by these illegal acts of Mr Ford; and therefore that there ought to be some qualification of the decerniture in terms of the libel, whereby it was found that he had ‘ forfeited all his rights by contract of marriage, jure mariti, or otherwise, the same as if he were naturally dead.’ The Commissaries having adhered, he presented a bill of advocation, which was refused by Lord

June 16. 1894. Meadowbank on the grounds which were explained by his Lordship in the following note:—

‘ 1st, The pleas of remission or collusion can only competently be urged in bar of the dissolution of the marriage of the parties litigant. But in this bill, as well as in the proceedings before the Commissaries, the complainer has renounced all intention of objecting to the marriage of Mr. Ford and the pursuer being dissolved. In that situation, the Lord Ordinary apprehends neither the one plea nor the other is competent to the complainer, who actually concurred in the judgment of the Consistorial Court divorcing the parties.

‘ 2d, Parole proof of collusion can only competently be offered before the oath of calumny has been emitted, as was decided in a late case, (M’Lean is believed to be the name of the party). But here, without objection, the oath of calumny was administered, and the deposition of the pursuer upon the point of collusion is complete, and exhausts that part of the cause. The condescendence, therefore, of the circumstances offered to be established in proof of collusion, is *hoc statu* inadmissible; and, were it otherwise, they do not appear to the Lord Ordinary to infer, if made out, the conclusion contended for, but the very reverse.

‘ 3d, The plea of remission may be urged at any period of the suit, and indeed can only be brought forward after the adultery is proved. But the circumstances alleged in the condescendence to substantiate the plea, took place before Mr. Ford is proved to have gone to France with the individual with whom the crime is charged to have been committed, and continued there to reside with her in a state of adulterous intercourse. So far, therefore, there is no room for inferring remission from the circumstances stated to have taken place on the part of the pursuer. But, in order to infer remission, the previous knowledge of the adultery must be clearly made out, and the circumstances from which it is to be inferred pregnant, and of indisputable import. In the case of the plea being urged against the wife in particular, the law, it is thought, will make great allowance for the situation in which she is placed: Often without the means of leaving her husband,—generally of habits of indecision,—in most instances unwilling to drive matters to an extremity betwixt them,—in all, where there is a family, having before her eyes the prospect of a separation from her children, and of leaving them under the guardianship of one from whom they are not likely to derive much attention or

‘beneficial instruction. These considerations, it can hardly be doubted, must be allowed weight in all such instances; and therefore the Lord Ordinary inclines to think that many circumstances will, where remission is pleaded against an action of divorce where the wife is pursuer, be often disallowed to infer that conclusion which would have borne an opposite construction if pleaded against a husband, to whom most of them cannot apply, and who is degraded even by exercising that forbearance towards the vices of his wife, which, on her part towards her husband, is often the result of the most amiable feelings, and which, instead of lowering, not unfrequently exalts her character in the world.’

June 16. 1821.

‘The Lord Ordinary is, therefore, in this case, more than doubtful whether the circumstances alleged to have taken place before the defender’s having withdrawn to France, can be held as relevant to infer the plea of remission. On the contrary, there is no proof offered of Mrs Ford’s absolute knowledge of the adultery before this occurred. They no doubt exhibit a suspicion of her husband’s conduct, but no more; and it would be highly dangerous to infer such knowledge from loose conversations, which may have been held under circumstances of irritation, or when, in truth, the pursuer meant only to state her suspicions. But, as before stated, there is nothing condescended on as inferring remission, after the withdrawing of Mr Ford to France.’

Against this judgment the appellant presented a petition to the Court; but their Lordships, on advising it with answers, adhered, and refused a petition on the 19th November 1821.\*

Against these judgments he appealed, and maintained,—

1. That the plea of collusion was not incompetent, or excluded by the respondent’s oath; and that it appeared from the whole circumstances of the case that there was collusion; and, at all events, the appellant was entitled to prove, by additional circumstances, that there was such a collusion.

2. That the facts stated in the condescendence were perfectly relevant to infer the defence of *remissio injuriæ*. With regard to the peculiarities of a wife’s situation, and the allowance that ought to be made for her in this matter, he contended, that any such question must be one of circumstances; and therefore an opportunity should have been allowed for ascertaining these by proof, whereas all evidence had been rejected. And,

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\* See 1. Shaw and Ballantine, No. 336.



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3. That, at all events, the judgment of divorce ought to have been qualified by a reservation, to shew that the legal effect of the divorce upon the civil rights of the parties was a point not thereby decided, but was open to be tried by the Court of Session, which was the only competent authority in the first instance.

On the other hand, the respondent maintained,—

1. That it was settled law, that after a party in her situation had emitted an oath de calumnia, and had been examined in regard to collusion, it was not competent to allow the defender a proof of such an allegation; and therefore, that as this was the situation in which the present case stood, the appellant was not entitled to redargue her oath by other evidence.

2. That the allegations in the condescendence relative to the plea of remissio or forgiveness may be a good defence as to past wrongs, but it is not a license to commit in future the like offences with impunity, and the privilege of using it may be lost by a repetition of the offence. In order to found this plea in any case, it must be averred and instructed, that the injured party not merely harboured suspicions, but had sufficient knowledge of the wrong done; and that, nevertheless, such party forgave the offence, either in express terms, or by acting in such a manner as necessarily to imply a remission. A distinction, however, must, in this respect, be made between the two sexes, and that distinction is well and eloquently expressed in the note of the Lord Ordinary. A husband would be degraded to infamy by exercising such forbearance towards the vices of his wife, which on her part, when he is the offender, may be not only excused, but applauded, as dictated by amiable and virtuous feelings. But, in the present case, there was no allegation of such knowledge on the part of the respondent as could found the plea. The most anxious concealment from her had taken place. The criminal intercourse between the parties in Scotland did not take place openly till after she had gone to England. She had no means of discovering that which had been carried on in France, where the parties, for the purpose of concealment, held forth that they were uncle and niece; and with the same view, and in order to conceal their adulterous connexion from her, they had corresponded under false names. And,

3. That the decerniture was precisely in the established and proper form, and was the legal consequence of the finding that her husband had been guilty of adultery.

The House of Lords 'ordered and adjudged that the appeal be dismissed, and the interlocutors complained of affirmed.' June 16. 1894.

*Respondent's Authorities.*—Humphray v. Nate, Feb. 18. 1814, (Ferguson's Rep.); St Aubine v. O'Brian, March 3. 1814, (Ferguson's Rep.); 1. Stair, 4. 20.; 1. Ersk. 6. 48.

A. GORDON—SPOTTISWOODE and ROBERTSON,—Solicitors.

(Ap. Ca. No. 67.)

JAMES BUCHANAN and Others, Appellants.—*Bosanquet—Greenshields.*

No. 52.

Mrs CRAWFORD or MOLLISON, Respondent.—*Moncreiff—Cunningham—Gillies.*

*Donation, or Anticipated Payment of Legacy.*—Circumstances under which it was held, (affirming the judgment of the Court of Session), That a sum of money paid by a testator to persons to whom he had bequeathed one-half of his effects, was an anticipated payment of their provision, and not a donation.

STEPHEN ROWAN, who had been the master of a merchant vessel, and afterwards a partner in a mercantile house in Port-Glasgow, married Mrs Margaret Crawford about 1764. Partly by his own exertions, and partly by the most penurious habits, he realized upwards of L. 28,000. No contract of marriage had been executed, and he had no children. His nearest relations were the family of his niece, Jean Miller, wife of George Buchanan, merchant in Glasgow. In August 1805 he executed a trust-deed of settlement, with the consent of his wife, by which he conveyed to her and certain other persons, chiefly her relations, (among whom was Mr James Crawford), as trustees, his whole estates, real and personal. By this deed, after appointing certain specific legacies to be paid, he directed the trustees 'to dispose of the remainder and reversion of my said estates, real and personal, by paying one-half thereof to my said wife; whom failing, to her disponees or assignees; whom failing, to her nearest heirs whatsoever: And, of the other half, to pay L. 1000 to the said Jean Miller, wife of George Buchanan, at the expiry of one year after my death, for her liferent thereof, and to be at her disposal to and among her lawful children; but the rest of said half shall be liferented by my said wife, if she survive me, during all the days of her life, and thereafter by the said Jean

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Lord Pitmilley.

June 16, 1824. ' Miller, wife of George Buchanan, during all the days of her  
' life, if she survives my said wife; and, on being freed of said  
' liferents, shall be paid to and among the children of the mar-  
' riage between the said Jean Miller and George Buchanan,  
' equally; declaring, that what is by this settlement ordained to  
' be paid to their mother shall, in case of her death, go to her  
' said children, equally among them; and if any of these children  
' die, leaving lawful issue of their bodies, the share designed by  
' this deed for such child so deceasing shall go to the deceiver's  
' said lawful issue; and the trustees shall be at full liberty to pay  
' over to the said children their respective shares, if they think  
' proper, without waiting their coming to the age of majority, or  
' apply the same for them in any other manner they may think  
' proper.' And he further declared that this ' provision of pro-  
' perty and liferent so appointed for my said wife and her afore-  
' saids, shall be, and she hereby accepts of, in full of all that she,  
' or her heirs, executors, or representatives, can ask or claim  
' from me or my estate, by or through my death or her's, or by  
' law, contract of marriage, deed of settlement, bond of provi-  
' sion, or otherwise.' But he reserved ' power, at any time, to  
' sell, convey, and dispose of my said estates, real and personal,  
' and to burden and affect the same with debts, gifts, legacies,  
' and provisions, and to revoke or alter these presents at plea-  
' sure; declaring, however, that this deed, so far as not so revoked,  
' altered, or changed, shall remain good and effectual, whether  
' found in my own custody or that of any other person at my  
' death, the delivery thereof being hereby dispensed with.'

On the 12th December 1812 Mr Rowan added a codicil to the trust-settlement, by which he nominated additional trustees, but in other respects confirmed the deed; and this codicil, as well as the deed itself, was signed by his wife. In the month of October 1813 Mr James Crawford, one of the trustees, received from Mr Rowan four bills, which were then current, amounting to L. 4270, payable by certain mercantile companies in Glasgow, blank indorsed by Mr Rowan, and which he requested Mr Crawford to deliver to Mr Buchanan. No written instructions were given to Mr Crawford, but it was stated by him in a judicial declaration which he emitted by order of the Court, that Mr Rowan told him that he intended these bills as an anticipated payment of what Mr Buchanan and his family were to receive at his death, as at this time two of Mr Buchanan's sons were about to enter into commercial business, and the money might be useful to them; and that he further

desired him to get from Mr Buchanan an acknowledgment of receipt of the money, with an obligation to pay interest during his life. Mr Crawford accordingly carried the bills to Glasgow, and there delivered them to Mr Buchanan, from whom he received the following acknowledgment, subscribed by himself and the whole family :—‘ With grateful hearts we, Jane Miller your niece, George Buchanan her husband, James Buchanan their eldest son, George Buchanan their second surviving son, Margaret Buchanan their eldest daughter, Jane Buchanan their second daughter, and Elizabeth Buchanan their youngest daughter, acknowledge to have received from you, Stephen Rowan, Esquire, by the hands of James Crawford, Esquire, the following bills :—viz.

‘ Hopkirk Cunningham and Company’s acceptance			
‘ to you, dated 17th May 1813, at six months, for L. 560	0	0	
‘ Graham, Bell and Company’s acceptance to you,			
‘ 17th May 1813, at six months, for	1575	0	0
‘ Hopkirk Cunningham’s acceptance to you at twelve			
‘ months, for	560	0	0
‘ Graham, Bell and Company’s acceptance to you,			
‘ 17th May 1813, at twelve months, for	1575	0	0

‘ making together the sum of L. 4270 sterling ; for which sum we become bound to pay you interest when required, agreeably to your desire. We are, with sincere gratitude and respect, Sir, your obliged humble servants, Jane Miller, George Buchanan, James Buchanan, George Buchanan, junior, Margaret Buchanan, Jean Buchanan, Elizabeth Buchanan X her mark. Glasgow, 1st October 1813.’ This acknowledgment was enclosed in the following letter by Mr Buchanan to Mr Rowan, and thereupon delivered to Mr Crawford :—‘ Glasgow, 1st October 1813. Stephen Rowan, Esquire. Sir,—I received to-day from the hands of James Crawford, Esquire, four bills, amounting to L. 4270 sterling, which is gratefully acknowledged by Mrs Buchanan, myself, and all our family, which is enclosed. I do not know, Sir, how to find words to express my sense of this generous kindness bestowed by you on Mrs Buchanan and my family in such handsome terms. It is a rare instance of kindness bestowed in the lifetime of the giver ; and this we reverence with sentiments which we cannot express. We also feel our obligations to our highly respected and kind friend Mrs Rowan. It has been with sincere regret that I have been in-

June 16. 1824. 'formed by Mr Crawford that you continue considerably indis-  
 'posed. I hope we shall hear of a favourable turn. With  
 'the kindest respects of Mrs Buchanan and all my family to  
 'you and Mrs Rowan, I am, most respectfully, Sir, your  
 'much obliged and humble servant, George Buchanan.' This  
 letter, with the enclosure, was carried by Mr Crawford to Mr  
 Rowan, and soon thereafter Mr Buchanan went to Port-  
 Glasgow, and waited upon Mr Rowan to express his gratitude.  
 On that occasion it appeared, from a declaration which Mr  
 Buchanan emitted by order of the Court, that when he men-  
 tioned the object of his visit, Mr Rowan stated that he had made  
 his will some time ago; and being then at an advanced age, and  
 in bad health, he burst into tears: that Mrs Rowan, who was  
 present, said, that it had been done to save expense, and that  
 Mr Rowan had left his property betwixt her and Mr Buchanan's  
 wife: that in the course of conversation Mr Rowan again intro-  
 duced the subject of his will, in which he said, if it was to be  
 made again he would insert Mr Buchanan as a trustee, and  
 hoped that he would not take it amiss that he was not named in  
 the will. Within a few days thereafter Mr Rowan died; and  
 the trustees thereupon took possession, and made up inventories  
 of his effects, in which they included the amount of the bills  
 which had been delivered to Mr Buchanan, and which they  
 stated they were obliged to do by the Stamp-office, in consequence  
 of the terms of the acknowledgment. A question then arose  
 between Mrs Rowan and the family of Mr Buchanan, as to whe-  
 ther these bills were to be considered as an anticipated payment  
 of their half of the effects as provided by the settlement, or as  
 a pure donation. The former proposition was maintained by  
 Mrs Rowan, while the latter was asserted by Mr Buchanan and  
 his family. To settle this question the trustees raised a process  
 of multiplepinding, in which claims were lodged for these  
 parties. Before any judgment was pronounced Mrs Rowan  
 died, and was succeeded by the respondent her sister, Mrs  
 Mollison, as executrix.

On advising the cause, Lord Pitmilley found, 'that the bills  
 'cannot be imputed in payment of the provisions to which Mr  
 'Buchanan and his family have right by the settlement of Mr  
 'Rowan; and that they are entitled to these provisions over  
 'and above the amount of the bills, in respect it has not been  
 'averred and offered to be proved by competent evidence on the  
 'part of the competitor, Mrs Euphemia Crawford or Mollison,  
 'that on the 1st October 1813, when Mr Buchanan and his

‘ family received the four bills in question from Mr James Crawford, and granted their acknowledgment for these bills, they were in the knowledge of Mr Rowan’s settlement, and of their eventual interest under it, and granted their acknowledgment for the bills with reference to the settlement; and in respect the presumption of law with regard to Mr Rowan, arising from the undisputed circumstances of the case, and from the writings produced, is, that he did not intend to give the bills in question to Mr Buchanan and his family, either in advance of what he had bequeathed to them by the settlement, or as a loan, but that he gave the bills as a donation during his lifetime.’

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The respondent, Mrs Mollison, having lodged a representation, the Lord Ordinary found, that although Mr Crawford, from his interest in the succession and relationship, was inadmissible as a witness, yet it was proper that both he and Mr Buchanan should be judicially examined; which was accordingly done. Thereafter, on advising memorials with the declarations, his Lordship recalled the above interlocutor, and in respect of the nature and circumstances of the case, reported it on informations to the Court. On the part of Mr Buchanan and his family, it was maintained,—

1. That as the bills had been delivered blank indorsed during the life of Mr Rowan, the presumption was, that they were intended as a donation; that as his settlement must be considered as the last act of his life, and consequently posterior to the delivery of these bills; and as by that settlement they were entitled to one-half of what he should die possessed of, it was impossible, consistently with the established principles of law, to regard the delivery of the bills as an anticipated payment of part of that half.

2. That this was confirmed by the circumstances of the case; the family of Mr Buchanan being the only blood-relations of Mr Rowan, and as such his natural heirs; and he having, without objection, received and kept the letter of Mr Buchanan, in which the act was described as one of great generosity; and as he must have been fully aware that they knew nothing of his will, and must consequently have regarded it as a simple donation. And,

3. That although it was true that, by the deed of settlement, the fee of one-half was to go to Mrs Rowan, and she was to enjoy the liferent of the other, and had in consideration thereof renounced her legal rights, yet he had reserved power to dispose

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formed by Mr Crawford that you continue to think fit; and, posing. I hope we shall hear of a further making this gift. the kindest respects of Mrs Buchanan, Mrs Mollison,— you and Mrs Rowan, I am, most and relative letter, much obliged and humble servant, were entirely exclusive letter, with the enclosure, was contained, that they were intended as Rowan, and soon thereafter a settlement had been made on Glasgow, and waited upon Mr Buchanan between Mrs Rowan and the On that occasion it appeared one half to be payable to the latter Buchanan emitted by oral agreement; that Mr Rowan had recently, tioned the object of his bills, confirmed his settlement by his will some time ago, could not be alleged that he had changed in bad health, he admitted the theory of Mr Buchanan and his family present, said, that Mr Rowan had must have altered his views entirely, by allotting Mr Rowan had more than a seventh part of his whole effects, and deduced the wife of the liferent of this part. made ago, that it was farther established by the declaration of Mr hoped that the bills were a mere anticipated payment, but the witness admitted that, when the subject was mentioned to Mr Rowan, he immediately alluded to his will and burst into tears, the shewing that he considered the delivery of the bills of thereby connected with his will, and bearing reference to his death, which he saw was rapidly approaching. And,

3. That Mr Rowan, consistently with the obligations which he had undertaken to his wife by the deed of settlement to which she was a party, could not make such a donation.

Lords Craigie and Bannatyne were of opinion that the bills were to be considered as a donation, while the Lords Justice-Clerk, Glenlee and Robertson, held that they must be regarded as an anticipated payment; and the Court, therefore, on the 22d February 1822, found, that the amount of the four bills in question falls to be imputed in part payment of the provisions to which Mr Buchanan and his family have right by the settlement of Mr Rowan, and that they are not entitled to these provisions over and above the amount of the bills; and remitted to the Lord Ordinary to proceed accordingly.\*

Mr Buchanan and his family appealed, but the House of Lords ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.

\* See 1. Shaw and Ballantine, No. 390.

—Stewart, July 24. 1623, (11,439.); Stirling, June 20. 1704, June 16. 1824.

(3.)—3. Stair, 843; 3. Ersk. 9. 16.; Sorlies, Dec. 5. 1771,  
1804, (No. 2. App. Legitim.)

A. MUNDELL,—Solicitors.

LOP and Company, and WELLWOOD and MAX-  
HYSLOP, Appellants.—*Adam—Jameson—McNeill.*

No. 53.

DAVID GORDON, Respondent.—*Wetherell—Shadwell.*

*Et e Contra.*

*Jurisdiction—Interest—Process.*—A party who was a native of Scotland, but resident at New-York as a merchant, having brought an action before the Court of Session against two Scotsmen carrying on business in Jamaica, in regard to transactions which took place in America and the West Indies, without founding a jurisdiction; and having concluded against them for payment of a sum in sterling money, with the legal interest thereon; and the Court of Session having, under the circumstances of the case, sustained their jurisdiction; and the parties having then gone into a long and intricate litigation; and the Court having decreed for a sum in dollars, (being the money in which the accounts were kept), and found, that under the conclusions of the summons the pursuer could not insist for American interest; —The House of Lords refused to open up the question of jurisdiction; found that decree should have been given in sterling money; that interest at five per cent was due on the principal; and in part reversed the judgments as to the amount of the principal sum.

THE respondent, David Gordon, was a native of Scotland; but left that country early in life, and in 1799 settled in New-York as a merchant. The appellants, Wellwood and Maxwell Hyslop, were also natives of Scotland, the former of whom settled in Kingston of Jamaica as a merchant, and Maxwell, after having gone to New-York, and been educated there as a merchant by Gordon, entered into partnership with his brother at Kingston, under the firm of M. Hyslop and Company. Their father had been proprietor of an estate in Dumfries-shire, which he sold, and L.2000 of the price were retained by the purchaser to meet an annuity constituted on the estate, and to which sum, on their father's death, they acquired right. Various commercial transactions took place between Hyslop and Company and Gordon, of a very complicated and intricate nature, and of which it is only necessary to notice as much as may be

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2D DIVISION.  
Lord Polkennet.



June 16. 1824. necessary to render the judgment which was ultimately pronounced intelligible.

With the view of carrying on their trade between Kingston and New-York, Hyslop and Company purchased an armed vessel called the Agnes. This vessel they sent to New-York, where she arrived at a time when Wellwood Hyslop was there. Gordon was desirous to have taken a third share of her; but it was found that he could not do so consistently with the Registry Acts. He, however, joined as a partner in a cargo which was shipped on board of her for Bermuda. At this time St Domingo was engaged in hostilities with Britain, but was at peace with America; and an agreement was entered into by Wellwood Hyslop, (which, after his departure from New-York, was subscribed by Gordon as his attorney), by which it was arranged that the Agnes should convoy an American ship, the Huntress, to St Domingo in safety. She accordingly did so; but this having been discovered at Bermuda, she was seized by a British ship of war, together with her cargo, and condemned for illegally acting as the convoy of a neutral vessel to a hostile port; and, in consequence of this, it was stated that the underwriters, who were not made aware of the above agreement, refused to settle for the loss. An appeal was afterwards taken against this condemnation, and a compromise was made by the captors, who agreed to give up the vessel on payment of a sum of money.

In the course of their transactions certain bills of lading of a cargo intended to be shipped by Hyslop and Company were transmitted to Gordon, who on the credit of them raised a sum of 5000 dollars, and at the same time granted his promissory-note for the amount, which was indorsed by a Mr Auchinvole in farther security, and thereupon delivered to the parties who had advanced the money. The shipment was never made; and the promissory-note was retired by Auchinvole, who delivered it to Hyslop and Company, for which they claimed credit in account with Gordon.

On the 28th December 1808, while Gordon was still in New-York and the Hyslops in Jamaica, he, with a mandatory, raised an action before the Court of Session, alleging that the Hyslops were indebted to him in L.6000, and concluding 'that the said Wellwood Hyslop and Maxwell Hyslop, defenders, jointly and severally, ought and should be decerned and 'ordained, by decree of the Lords of our Council and Session, 'to make payment to the pursuer and his said attorney of the 'said sum of L.6000, with interest thereof from the date of

‘ citation to follow hereupon ; or at least to render a just and true  
 ‘ account and reckoning with and to him, for their several deal-  
 ‘ ings and transactions with him and on his account, and sums  
 ‘ received by them from or for him ; and to make payment of  
 ‘ the balance, amounting to said L.6000 at the date of cita-  
 ‘ tion hereto, or to whatever other sum, more or less, the same  
 ‘ may be found then to amount, including interest during the  
 ‘ currency of their accounts, as usual on such transactions and  
 ‘ accounts, and with the legal interest of the balance from the  
 ‘ date of citation hereto during the not-payment of the same.’

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The summons was executed edictally ; and at first, no appearance being made, decree passed in absence. In virtue of this summons arrestments were executed in Scotland, and Gordon also attached certain funds belonging to the Hyslops in the hands of one Dallas in America. Appearance was thereafter made by the Hyslops, who contended, that as all the parties were resident abroad, and as the whole of the transactions had taken place out of Scotland, the Court of Session had no jurisdiction.

On the other hand, it was stated by Gordon, that as the parties were native Scotchmen, and the Hyslops had right to property in Scotland, which he had arrested on the dependence of the action, and as both he and one of them had returned to Scotland since the action was instituted, the Court had jurisdiction.

The Lord Ordinary, on the 28th November 1809, repelled this defence ; and the Court, on the 30th May 1810, ‘ in the  
 ‘ particular circumstances of this case, adhered to the interlocutor  
 ‘ complained of, in so far as it sustains the competency of the  
 ‘ action.’

No appeal was at this time taken against this judgment ; and the parties then entered upon the merits, which gave rise to a very extensive and voluminous discussion, in the course of which the case was four times remitted to an accountant, and about twenty special interlocutors were pronounced by the Court, the last of which was dated on the 1st of March 1821. In regard to the question relative to the Agnes, the Court found, that Gordon was not liable for any part of the loss upon the ship ; but that he was liable for a third share of the loss of the cargo. As to the promissory-note, which had been retired by Auchinvole, they found, that the Hyslops were entitled to take credit for the amount of it, provided they found satisfactory security to relieve Gordon of all claims connected with it and the bills of lading : that Gordon, on the other hand, was bound to find security to repay to

June 16. 1824. Hyslops whatever sums he might recover by virtue of his attachments in America : that Hyslops were not entitled to deduction of a sum of L.414. 6s. 11d. which Gordon had received from a Company of the name of Hughes and Duncan : that a balance of 1856 dollars 93 cents of principal was due to Gordon as on the 28th December 1808 ; but from which there fell to be deducted certain sums which he had recovered under interim decrees ; and found, ' that conformably to the conclusions of the ' libel in this cause, the pursuer is not entitled to any higher rate ' of interest, after citation, than 5 per cent, being the legal rate ' concluded for.' Both parties thereupon appealed,—Hyslops, in regard both to the competency and merits of the cause ; and Gordon also upon the merits and restriction of interest to that of 5 per cent, which, he contended, should have been 7 per cent, being American interest.

The House of Lords pronounced this judgment:—' The ' Lords Spiritual and Temporal in Parliament assembled, find, ' according to the third supplemental report of the accountant, ' that the balance due to the respondent in the original appeal ' on the 28th of December 1808, calculated in dollars payable in ' New-York, was 20,867 dollars 50 cents, whereof 18,056 dollars ' 93 cents are principal, and 2810 dollars 57 cents are interest. ' And the Lords further find, that it ought to be ascertained and ' found how much the said balance amounted to in sterling money in Great Britain on the 28th December 1808. And the ' Lords further find, that the appellants in the original appeal ' are entitled to deduction from the said balance, when so ascertained as aforesaid, together with such interest thereon, as here- ' in after directed, of the sum of L.414. 6s. 11d. received by the ' said respondent from Hughes and Duncan on the 10th of July ' 1809, and also of the sums received by the said respondent in ' virtue of interim decrees of the Court. And the Lords further find, that provided the said appellants shall, within such ' time as the Court shall appoint, find security satisfactory to ' the said Court to relieve the said respondent of all claim against ' him connected with his bill or note to Mr Auchinvole for ' 5000 dollars, at the instance of the said Mr Auchinvole, or any ' person in his right, by virtue of the bills of lading mentioned in ' the answers to the objections against the second supplemental ' report, they shall in that case be entitled to a further deduction ' from the said balance of the said 5000 dollars of principal, and ' interest thereof, at 7 per cent, from the 6th of September 1808, ' and the 28th December thereafter—the amount thereof on the

‘ said 28th of December to be ascertained in sterling money of June 16. 1894.  
 ‘ Great Britain, without prejudice to any claims competent to the  
 ‘ said respondent upon the said bills of lading, and for recovery  
 ‘ of the same from whoever may be possessed of the same, as ac-  
 ‘ cords of law. And the Lords further find, that the said res-  
 ‘ pondent, before extract, must find caution to the satisfaction of  
 ‘ the said Court of Session to repay to the said appellants what-  
 ‘ ever sums shall be received by him or his attorney in America,  
 ‘ in virtue of the attachments in Mr Dallas’s hands, in so far as  
 ‘ he may thereby recover more than the payment of the sums to  
 ‘ be ultimately found due to him. And the Lords further find,  
 ‘ that the said respondent is entitled to interest at the rate of 5  
 ‘ per cent, from and after the 28th December 1808, on the sum  
 ‘ of 18,056 dollars 93 cents, estimated in sterling money of Great  
 ‘ Britain as aforesaid, to the time of the final decree to be pro-  
 ‘ nounced by the said Court—due allowance being made for the  
 ‘ sums directed to be deducted therefrom as aforesaid, for which  
 ‘ credit is to be given from time to time as the same were re-  
 ‘ spectively received, and interest on the sum due at the time of  
 ‘ the final decree from thence till payment. And the Lords  
 ‘ further find the said respondent entitled to the expenses of  
 ‘ process in the Court of Session, subject to modification. And  
 ‘ it is ordered and adjudged, that the said interlocutors com-  
 ‘ plained of, so far as they are inconsistent with the above find-  
 ‘ ings, be, and the same are hereby reversed. And it is further  
 ‘ ordered, that the cause be remitted back to the Court of Ses-  
 ‘ sion in Scotland, to do therein as shall be consistent with this  
 ‘ judgment, and as shall be just.’

**LORD GIFFORD.**—My Lords, There is one other case, on which I shall not detain your Lordships very long,—a case which occupied undoubtedly a great portion of your Lordships’ time—a case which one cannot but lament it is necessary to bring before your Lordships. It is the case of *Hyslops v. Gordon*. My Lords, this was an appeal on the part of the appellants against, I think, no less than nineteen interlocutors of the Court of Session; and, on the part of the respondents, parts of those interlocutors were also appealed from. This cause comes on before your Lordships on both appeals.

My Lords,—It is not my intention, undoubtedly, to detain your Lordships by going through the whole of this most complicated case. The appellants, who are brothers, were engaged in a great number of commercial transactions, from the year 1803 to the years 1806 and 1807, with the respondent Mr Gordon, who was a merchant, and at that time resided at New-York. My Lords, transactions to a very

June 16. 1824. large amount took place between them, and a balance being considered by Mr Gordon to be due to him in the year 1808, he commenced an action in the Courts of Scotland against the Messrs Hyslop, to recover the balance which he alleged to be due to him. My Lords, the appellants not being at that time in Scotland, a decret in absence was pronounced; but they afterwards came in and took a preliminary objection to this action, that this decree was improperly pronounced; that the Courts in Scotland had no jurisdiction over the case, as they were not resident in Scotland, nor had any property there enabling the Court to have jurisdiction over them. I should state to your Lordships, however, that so long ago as the year 1810 those defences were finally repelled; and that after the year 1810, down to the year 1820, when I think the last interlocutor was pronounced, proceedings occupying these two volumes took place in the Courts in Scotland upon the subject of this cause. My Lords, upon the subject of the preliminary objection, I must confess that time and reflection have not altered the opinion I at first formed, that that objection, if it be one, should have been brought before your Lordships by appeal, within a limited period after 1810, for it was a defence that went to the whole action. If it had been decided in favour of the appellants that they were not liable to the jurisdiction, there would have been an end of the whole; and it is clear, an appeal might have been brought into your Lordships' House by the present appellants. The defences were not sustained, but were repelled: Being repelled, it appears to me it was incumbent on the appellants to bring that before your Lordships within the time limited by Act of Parliament, which has not been done; independently of which they go on, as I stated to your Lordships, from the year 1810, when this preliminary defence was repelled, they go on in proceedings occupying these two volumes without any reference to this preliminary objection. Independently of that, I think a great deal might be said upon the question of the Court having jurisdiction originally over this cause. However, my Lords, I do think that, under the circumstances of this case, those interlocutors cannot now be questioned.

My Lords,—The Court of Session, in the early stage of this proceeding, as the only mode of getting at the justice of the case, referred all those accounts to an accountant. He made a very long and elaborate statement of the accounts. Great fault was found with him for not only deciding matters of fact, but questions of the law of America; the consequence of which was, that though the report was brought before the Court of Session, it was again referred and again brought before the Court of Session; and there were four reports. Objections many in number were made, more particularly to various items in respect of the ship *Agnes*;—in fact, that formed the principal ground of objection to the decision of the Court of Scotland. That vessel having taken on board a cargo, was afterwards seized, in consequence of being supposed to be concerned in a transaction subjecting her to forfeiture, and her cargo condemned, and she was then repurchased by

**Messrs Hyslops.** They first of all endeavoured to make out that Mr Gordon was originally a partner in the vessel itself, as well as in the cargo. The Court of Session determined, that he was liable only as to the cargo and not the ship, and they decided, that the illegality of the transaction was not made out, and that therefore the sum was well charged against the appellants. There were a variety of other objections, on which great difference of opinion at one time prevailed in the Court below; but finally, in the year 1820, they adopted the final report of the accountant, by which he found that the sum of D. 18,056. 593 cents for principal were due on the 28th December 1808, which, I take it, was the commencement of these proceedings, and D. 2810. 50 cents for interest. The Court of Session, my Lords, adopted this report, and they found, that the balance reported by the accountant as due to the pursuer on the 28th of December 1808, and payable in dollars at New-York, was the sum I have mentioned for the principal, and the sum I have mentioned for interest; and the effect of their decision is ultimately to determine in favour of Mr Gordon for that sum, subject to certain deductions mentioned in the interlocutor.

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**My Lords.**—It is known to your Lordships to be the practice of this House, that where judgments are affirmed, it is not always the habit to pronounce the reasons why they are affirmed; and, my Lords, if I were in this case to travel through those minute accounts, and state all the points which have been made, I should occupy your Lordships almost as long as the original bearing of the appeal. With all the attention I have been able to pay to the case, attended with difficulties as it is, I cannot help thinking substantial justice has been done by the final report of this accountant, as far as that balance is concerned. I think the objections made have been well answered in the papers below, as well as at your Lordships' bar.

It is admitted, that if the appellants are right in respect of the ship *Agnes*, that would have turned the balance the other way: but I think on that subject the decision of the Court of Session was perfectly right. It does not appear to me that Mr Gordon was liable for that vessel, though he was liable for his share of the cargo; nor do I think that transaction was illegal so as to debar him from the claim he has made against these parties. It appears that, though the ship was condemned, yet there was afterwards, on the appeal to this country, a compromise between the captors and Messrs Hyslop, and actions, or at least claims, are now existing on the policy of assurance.

But, my Lords, undoubtedly the Court of Session have got into a difficulty, from which it is impossible for this House to relieve the parties without sending this case back:—these accounts were kept in dollars; the claim in Scotland was a claim for a balance in sterling money; the Court of Session find, that this sum is due in dollars, payable in dollars at New-York. Now, how is it possible for the appellants to carry into effect this judgment? how is the respondent to obtain this sum in dollars payable in New-York? There would be a

June 16. 1824. great contest between these parties as to the rate of exchange, and the sum payable in this country. The payment cannot be enforced in New-York, and undoubtedly the Court of Session should have done that in this case, which it is the habit of this country to do when an action is brought for a sum of money recovered in foreign money,—they should have ascertained what is to be paid in this country; and therefore, undoubtedly, this House must remit the case back, in order that that sum may be ascertained in British money which is due from the one party to the other.

My Lords,—Another difficulty has occurred in this case, in consequence of another appeal which your Lordships have decided. Mr Gordon, the respondent, had received the sum of L.414 from persons of the names of Hughes and Duncan at Liverpool, on account of Messrs Hyslop. On the contrary, it appeared that Hughes and Duncan at Liverpool had received from Messrs Hyslop only this sum of L.414, but they had afterwards paid bills for Messrs Hyslops to that amount; so that they had paid L.800, having only the L.400 in their possession. They afterwards brought an action against Mr Gordon and Messrs Hyslops, to recover back the sum of L.400 they had overpaid. It is perfectly clear they had a right to recover it from Messrs Hyslop. Mr Gordon resisted the demand of it from him, saying, It is clear it was due to me, therefore you, Messrs Hughes and Duncan, have no right to recover it back from me. At the time this cause was before the Court of Session, that cause was also depending before the Court of Session; but it so happened, that before this cause was decided, they decided that; and they decided that in which this House have not acquiesced,—that Mr Gordon was bound to repay that L.400. Of course, if he repaid the L.400 to Hughes and Duncan, Hyslop would not be entitled to credit for it in the account with him; and therefore, in 1820, they ‘supersede consideration of the question, ‘whether the defenders are entitled to deduction of L.414. 6s. 11d. sterling, recovered by the pursuer from Hughes and Duncan on the 10th July 1809, until a process relative to the pursuer’s right to retain that sum, which has been taken to report by Lord Bannatyne, ‘Ordinary, be advised by the Court.’ Then, when they came to a final decision on the 1st of March 1821, they ‘find, in respect of the ‘judgment of the Court pronounced this day in the process at the ‘instance of Hughes and Duncan against David Gordon and Maxwell Hyslop, that the defenders are not entitled to deduction in this ‘accounting of the sum of L.414. 6s. 11d. sterling, received by the ‘pursuer from Hughes and Duncan on the 10th of July 1809.’ They were not entitled, undoubtedly, to credit for it, if Mr Gordon was obliged to repay that sum to Hughes and Duncan. Your Lordships, however, have reversed that finding.\* It is clear that Messrs Hyslop

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\* See ante, Vol. II. p. 510.

are entitled to credit for the L. 414 which Gordon received from Hughes and Duncan on their account, and therefore that makes an alteration in the amount. June 16. 1894.

My Lords,—In the interlocutor of November 1890, there were several provisions made, which, it is stated, were not unusual in the Court of Session when accounts are finally adjusted, particularly with respect to a sum of money on a bill, that they shall give satisfactory security to the pursuer to relieve him from any claim on that sum, he to be entitled to credit for that sum, that security being first given to the satisfaction of the Court; there is also security to be given by Mr Gordon: ‘Of new find, that the pursuer must, before extract, find sufficient caution to repay to the defenders whatever sum shall be received by the pursuer or his attorney in America, in virtue of attachments in Mr Dallas’s hands.’

My Lords,—Really, after looking through these various interlocutors, it appears to me, that in order to get at substantial justice, and to put an end, if possible, to this litigation, which has now been depending ever since the year 1808, it will be necessary for your Lordships to come at some determinate finding, which, being remitted to the Court of Session, will enable them finally to adjust the account, which cannot be adjusted in your Lordships’ House.

There was one point made by the respondent the principal subject of his cross appeal, which is on the subject of interest. It appears that the Court of Session calculated interest at 7 per cent, which would have been the rate of interest payable between the parties in America, on the balance due at the time this action was commenced; but they thought that, according to the summons of the respondent, (the pursuer in the action), he was entitled only to 5 per cent from the time the action got into Court to final judgment. I think the Court of Session have adjudged rightly upon this point,—it is not my intention, therefore, to propose any alteration upon that subject; but I have drawn out a very long judgment, which I will submit to your Lordships to-morrow morning. I will just state what the subject of it will be:—To find that, according to the third supplemental report of the accountant, the balance due to the respondent on the 28th day of December 1808, calculated in dollars payable at New-York, was 20,867 dollars 50 cents, whereof 18,054 dollars 93 cents are principal, and 2,810 dollars 57 cents are interest—that is the sum which the accountant has stated. Find, that it ought to be ascertained and found, how much the said balance amounted to in sterling money of Great Britain on the 28th day of December 1808. Then, my Lords, to find that the appellants are entitled to a deduction from the said balance, when so ascertained, of the sum of L. 414. 6s. 11d., received by the respondents from Hughes and Duncan on the 10th July 1809, and also of all the sums received by the respondent in virtue of interim decrees of the Court. My Lords, in the course of the proceeding, the Court of Session being satisfied that there was a very large sum due to Mr Gordon, made



June 16. 1894: interim orders for sums within the balance for which they will undoubtedly be entitled to credit. Then to find, that provided the appellant shall, within such a time as the Court of Session shall appoint, find security satisfactory to the said Court to relieve the respondent of all claim against him connected with his bill or note to Mr Auchinvole for 5000 dollars, at the instance of the said Mr Auchinvole, or any person in his right, by virtue of the bills of lading mentioned in the answer to the objections against the second supplemental report, they shall in that case be entitled to a farther deduction from the said balance of the said 5000 dollars, the principal and interest thereof, at 7 per cent, from 6th September 1808 to 28th December thereafter; that is, adopting the interlocutor of the Court of Session; without prejudice to any other claims competent to the respondent upon the said bills of lading, and for recovery of the same from whomsoever may be possessed of the same, as accords of law. Find, that the respondent, before extract, must find sufficient caution to repay to the appellants whatsoever sums shall be received by him, or his attorney in America, in virtue of attachments in Mr Dallas's hands, in so far as he may thereby receive more than full payment of the sums to be ultimately found due to him; which is part of the interlocutor of the 23d of November 1820, which does not appear to be much quarrelled with at the Bar. Then find, that the respondent is entitled to interest at the rate of 5 per cent from and after the 28th December 1808, on the sum of 18,056 dollars 93 cents, balance of principal, as estimated in sterling money of Great Britain as aforesaid, to the time of the final decree; due allowance being made for the sums directed to be deducted therefrom as aforesaid, and interest on the principal sum due at the time of the final decree, from thence till payment. Then to reverse the interlocutors complained of, so far as they are inconsistent with these findings; and remit the cause to the Court of Session, to do therein as shall be consistent, and as shall be just between the parties.

My Lords,—I entertain a hope that these findings will be the means of closing this litigation between the parties, which undoubtedly is very much to be wished. It has been my object to prepare such a judgment for your Lordships to adopt, as shall have that effect. Whether or not I shall have succeeded, it is hardly possible for me to state, when I look at the voluminous nature of these proceedings; but I think, having fixed the balance due at the commencement of the transactions, and the credit the parties are entitled to, there is a foundation laid for a very speedy termination of this cause, when the Court shall have ascertained the amount in English money, on which the Court will have easy means of information as to the rate of exchange at the time. It appeared to me this was the best mode of adjusting this most complicated and difficult case between the parties, and the best mode of putting an end to the litigation which has so long existed between them.

*Appellants' Authorities.*—(*Competency.*)—Galbraith, November 15. 1636, (4430.); June 16. 1624. Blantyre, Dec. 8. 1626, (4813.); Brog's Heir, March 23. 1639, (4816.); Anderson, July 1747, (4779.); 1. Ersk. 2. 19.; Hist. Law Tracts, 252.

*Respondent's Authorities.*—(*Interest.*)—Bodilly v. Bellamy (2. Burr. 1094.); Campbell, Feb. 15. 1809, (F. C.)

A. MURDELL—A. GORDON,—Solicitors.

(*Ap. Ca. No. 69.*)

Trustees of Sir JOHN L. JOHNSTONE, Appellants.—*Warren*—No. 54.  
*Fullerton.*

WILLIAM ELLIOT, Respondent.—*Baird.*

*Process.*—Circumstances under which it was held, (affirming the judgment of the Court of Session), 1. That a party who had been employed to erect buildings, and had rendered an account, and raised a summons for a certain sum as due to him, was entitled to amend his summons, so as to conclude for a larger sum reported by valuers to be due to him; and, 2. That an amendment of the libel, which was lodged after the report of the valuers, had been acquiesced in by the defender, and therefore could not be objected to as incompetent.

IN 1808, Sir John Lowther Johnstone employed William Elliot, architect in Kelso, to make certain alterations and additions to his mansion-house at Westerhall. With this view; Elliot furnished to Sir John, plans, specifications, and estimates; but no formal contract was entered into. Besides the operations upon the mansion-house, Elliot was subsequently employed to erect a new kitchen, an ice-house, farm-offices, and many other pieces of work which had not been originally contemplated. In the course of executing the work, a dispute having taken place between them, Elliot, on the 24th July 1810, wrote to Sir John, that 'he had no objection that, instead of the sums charged in my estimates, the whole be submitted to the measurement and arbitration of two men of skill, mutually chosen, to settle between us for the whole concern from the beginning.' To this Sir John answered on the 27th, that 'I certainly approve highly of your proposal for us to have two men mutually chosen, with power, if they disagree, to call in a third, and settle the whole concern from the beginning.' The operations were continued, but frequent complaints were made by Elliot, that he was not supplied with money to enable him to carry them on. In March 1821, Mr Ure, writer to the signet, Sir John's agent, wrote to Elliot, that it was proposed to grant him a bond of L.1000;

June 22. 1824.

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June 22, 1824. and at the same time he stated, that 'I beg you will send me a state of your accounts with Sir John Johnstone from the commencement up to the present time, together with copies of any agreements you may have had with Sir John on the subject of the different buildings at Westerhall.' Elliot accordingly, on the 21st, transmitted an account, shewing that the total amount was L.2633. 4s. 8d., and that, after deducting partial payments, there was a balance in his favour of L.1383. 4s. 8d. independent of a claim which he had for foreign timber. This account, he afterwards alleged, was intended as a mere sketch, to shew that at least the full sum for which it was proposed to grant the bond was owing to him. The bond was accordingly granted, and the works were finished soon thereafter. Sir John died in the course of the year 1812, having appointed the appellants his trustees; and Elliot being unable to get a settlement, raised an action, in which he concluded, that the trustees should be ordained 'to name a sworn measurer to examine and measure the buildings and other works executed by the pursuer for the said Sir John Lowther Johnstone, and to fix a certain short day for such person so to be named by them to meet the pursuer, and a measurer to be named by him, to measure the whole buildings and other works executed by the pursuer for the said deceased Sir John Lowther Johnstone, that the price or value thereof may be ascertained and paid to the pursuer,' &c. and to make payment to the pursuer of the full price or value of said buildings, and other works executed by him as aforesaid, as the same shall be ascertained by the measurement of the several parts thereof,' &c.; and 'that, if the said defenders shall delay or refuse to name a measurer, or to fix a day for the measurement to take place as aforesaid, or shall refuse to pay the price or value of said works; after the same shall be measured, and the value thereof ascertained after the measurement is completed, the said defenders ought and should be decreed and ordained, by decret foersaid, to make payment to the pursuer of the sum of L.3300 sterling,' &c. under deduction of partial payments.

In defence the trustees pleaded, that Elliot was bound to abide by the account which he had rendered, shewing that the total cost, instead of being L.3300, was only L.2633, and that the balance due to him was L.1383, from which there fell to be deducted the bond for L.1000, and certain other partial payments, leaving an ultimate balance of only L.83; and that he

was not entitled to have the value ascertained by a remit to tradesmen. June 22. 1824.

The Lord Ordinary, on advising the case, issued the following note:—‘The Lord Ordinary has read the correspondence and whole process, and is of opinion, that a remit must be made to tradesmen to measure and calculate the price of the buildings executed at Westerhall. The remit may be before answer, but the Lord Ordinary thinks, on perusing the whole of the letters, that the pursuer is not bound by the statement of accounts contained in the letter of 21st March 1811. The pursuer had, it appears, given in estimates, but finding Sir John not quite satisfied, he offered, in the letter of 24th July 1810, to submit the work to the measurement and arbitration of neutral persons. This was agreed to by Sir John. The pursuer afterwards, in his letter of 21st March 1811 to Mr Ure, sent an account of what would have been due according to the estimates, (and he could make it out in no other way); but these estimates had been rejected, and a different mode of settlement agreed to. Sir John could not have been compelled by the pursuer to settle by estimates, neither can the pursuer be bound by them. The remit, however, may be made before answer, and the cause may be enrolled for the Lord Ordinary’s next hour, in order that the terms of the remit may be adjusted, and the measurers named.’ Accordingly, his Lordship afterwards, before answer, remitted to an architect and a sworn measurer, ‘to repair to Westerhall, and inspect and measure the work performed there by the pursuer for the late Sir John Lowther Johnstone, Baronet, and to put a value thereon, according to the price of similar works at the period they were executed in that part of the country, and to report.’ Against this remit the trustees reclaimed to the Court, but their Lordships adhered. A report was then made by the valuers, that the total charge for the work was L.3913. On considering this report, with objections, the Lord Ordinary issued a note, that it appeared to him that the libel was not sufficiently broad to comprehend two claims made by Elliot,—one of L.114. 12s. 1d. for plans, travelling expenses, and other charges, and another of L.90. 3s. 3d. for foreign wood. Elliot then lodged an amendment of the libel, including these two sums; and after the conclusion for L.3300, he proposed to insert this alternative, ‘or such other sum, less or more, as shall be found to be due to the pursuer, including the above-mentioned two sums of L.90. 3s. 3d. and L.114. 12s. 1d.’

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The Lord Ordinary then pronounced an interlocutor, by which he 'allowed the amendment of the libel now offered on the part of the pursuer to be received, and allowed the same to be seen till next calling.' No objections were offered; and Elliot having discovered that the claim for L. 90. 3s. 3d. was already embraced under the libel, lodged a minute, proposing to withdraw it from the amendment, and craving decree for the sum reported by the valuers, together with the account of L. 114. 12s. 1d., under deduction of partial payments amounting to L. 2550. This minute was allowed to be seen and answered; but no answers having been lodged, the Lord Ordinary decerned for the above sums, under deduction of the partial payments. Against this judgment the trustees lodged a representation, on advising which his Lordship found, 'that after the letters of 24th and 27th July 1810 had been sent and received, the pursuer could not have compelled Sir John Johnstone to settle with him according to the estimates which had been given in, or on any other principle than that Sir John should pay for the actual value of the work done, according to the measurement and report of skilful tradesmen: That the pursuer's letter to Mr Ure of the 21st of March 1811 could not alter the rights of parties as fixed by the previous correspondence above referred to: That no particular objections have been stated to the report of Messrs Laing and Johnstone, from which report it appears accordingly, that the representers are only required to pay the actual value of the work done, and that a great part of the work besides is not included in the estimates;' and therefore refused the representation.

The trustees then presented a petition to the Court, and hitherto no objection had been made to the amendment; but when the case came on for advising, it was objected to as incompetent. The Court adhered, so far as the interlocutor decerned for payment to the extent of the sum concluded for in the original libel, being L. 3300 sterling, under deduction of the partial payments; and remitted to the Lord Ordinary to hear parties farther as to the respondent's claim under the amendment of the libel, and do as he shall see cause. The case having returned to the Lord Ordinary, his Lordship pronounced this judgment:—'Finds, that the amendment of the libel, in so far as now insisted in by the respondent, relates to a sum of L. 114. 12s. 1d. as the amount of an account for plans, travelling expenses, and other charges: finds, that no particular

objection was stated to this account, or the charges in it, by the petitioners; but that the Lord Ordinary having, in his note of the 21st December 1816, suggested a doubt whether this account, and another small account not now insisted in, were comprehended under the conclusions of the original libel, the respondent put in an amendment of the libel, concluding for payment of these two separate accounts, neither of which had any connexion with the work reported on by Messrs Laing and Johnstone, which had previously formed the only subject of litigation between the parties: Finds, that the amendment of the libel was allowed to be seen by interlocutor of the 22d of January 1817; but that the objection now offered to it by the petitioners, viz. that it was not competent to give in the amendment of the libel at the late period of the cause in which the amendment was put in, was not stated to the Lord Ordinary, either at Bar, or in the representations which followed after the amendment was allowed to be seen, nor is any such objection stated in the petition to the Court: And in respect it appears to the Lord Ordinary, that it was competent to the respondent, against whom, as pursuer of the action, the objection, if competent and omitted, would not have applied to bring forward this new claim, after parties had joined issue on the other matters; and also, that the petitioners, who were allowed to see the amendment, but did not at that time offer any objection in point of form to its being received, cannot now be permitted to urge this formal objection—refuses the desire of the petition as to the respondent's claim under the amendment of the libel, and adheres to the interlocutor reclaimed against.\* The trustees then reclaimed to the Court; but their Lordships, on advising the petition with answers, on the 7th June 1821, adhered.

Lord Craigie was of opinion, that under the first conclusion an amendment was not necessary; but the other Judges dissented; and all agreed that, except for the conduct of the trustees, which barred them from objecting to it, the amendment was incompetent, seeing that the report of the valutors was equivalent to a proof.\*

The trustees then appealed to the House of Lords, and maintained,—

1. That Elliot was bound to abide by the account which he had originally rendered, shewing that the total charge was only

\* 1. Shaw and Ballantine, No. 63.

June 22. 1824. L.2633, and was not entitled to resort to the report of the

valuators, which stated that the total charge was L.3913.

2. That at all events the amount of that charge must be limited to the sum of L.3800, which he himself had specified in his summons as the utmost amount of his claim. And,

3. That as the report of the valutors was equivalent to a proof, and so liti-contestation had taken place, it was not competent for Elliot to amend his libel at that stage of the process, so as to make it coincide with the amount reported by the valutors: "that although the Lord Ordinary had allowed the amendment to be received, yet it had never been admitted as part of the libel; and therefore they could not be barred from objecting to its being admitted at any time prior to this being actually done.

On the other hand, Elliot contended,—

1. That as the account which he rendered was intended merely as a vidimus, to shew that at least more than L.1000 was due to him, he could not be foreclosed by it.

2. That although it was true he had underrated the value of the work which he had performed in his summons, yet he had an alternative conclusion for payment of such sum as should be ascertained by the report of valutors, (to which mode of proof Sir John Lowther Johnstone had expressly agreed), and therefore he could not be barred from getting what was justly due to him by having made a mistake as to the value of the work. And,

3. That the summons was sufficiently broad without an amendment; but at all events, as a remit to valutors could not be considered as equivalent to a proof, and so liti-contestation had not taken place, the amendment was quite competent; but supposing that it were not so, the trustees must be held to have agreed to its being received, because they allowed the interlocutor permitting it to be received to become final, and stated no objection till after judgment on the merits had been pronounced by the Lord Ordinary, and the Court were about to adhere to that interlocutor.

The House of Lords 'ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.'

*Appellants' Authorities.*—4. Stair, 39. 2.; 4. Ersk. 1. 69.

*Respondents' Authorities.*—Douglas, Dec. 23. 1693, (12,148.); Meldrum, July 28. 1716, (12,152.); Kinniburgh v. Earl of Morton, June 13. 1820, (not reported).

J. CAMPBELL—SPOTTISWOODE and ROBERTSON,—Solicitors.

(Ap. Ca. No. 77.)

ARCHIBALD WALLACE, for himself and WALLACE, CAMPBELL and Company, Appellant.—*More.* No. 55.

CHARLES CAMPBELL, Trustee for JOHN HAMILTON and Company, Respondent.—*Cockburn—Rutherford.*

*Partnership—Competition—Bankrupt—Title to Pursue.*—A partner of a Company having entered into a joint adventure with another, and made use of the name and credit of the Company; and the estates of the Company having been sequestrated, and a separate sequestration awarded against the partner, and different trustees having been appointed; and the trustee of the Company having raised an action against the other joint adventurer to account to him, and on the dependences arrested dividends due to the joint adventurer out of the estates of a sequestrated Company; and that joint adventurer having previously granted an assignation of these dividends to another party, and delivered relative dishonoured bills accepted by the sequestrated Company, which had been originally indorsed away and discounted by the joint adventurer, but had been returned on him; and the assignation not having been intimated till subsequent to the arrestments;—*Held*, (affirming the judgment of the Court of Session), That the arrestments by the trustee for the Company were preferable both to the assignation and bills held by the party acquiring them from the joint adventurer.

HUGH and WILLIAM HAMILTON were the partners of a Company which carried on business, in Greenock under the firm of John Hamilton and Company, and in Liverpool under that of William Hamilton and Company. The former of these branches was managed by Hugh Hamilton, and the latter by William Hamilton; and it was alleged that the partners were bound not to engage in any business on their private account. Hugh Hamilton, however, became a partner of Hyde and Company, merchants in Greenock, and embarked in a joint adventure with Boyd Dunlop and Company, merchants in Glasgow. In the prosecution of this joint adventure, Hugh Hamilton made use of the name and credit of John Hamilton and Company. Accordingly all the goods were purchased, and the invoices granted, and the bills accepted, either under the firm of John Hamilton and Company, or under that of Boyd Dunlop and Company—the name of Hugh Hamilton not being mentioned.

On the 2d of August 1814, Hugh Hamilton addressed a letter to Boyd Dunlop, the leading partner of Boyd Dunlop and Company, in which, after mentioning that he had experienced certain misfortunes, he stated, ‘I wish, as soon as you can, you would send me J. H. and Co’s account-current, calculating interest to this time. The tobacco concern I wish

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' out of sight. This will make no difference (to you), but of  
' much consequence to me, as I will tell you again. You need  
' not bring profit into the account; merely mention at the foot,  
' that so much may be expected to come from the specula-  
' tion. The three bills I got I will destroy, as you desired.  
' You will, of course, leave them out also. I beg most  
' earnestly you will say nothing of this to any body.' On  
the 20th of the same month, Hyde and Company having  
become bankrupt, a sequestration was awarded of their estates,  
and of that of Hugh Hamilton as an individual; and Mr John  
Dunlop, writer in Greenock, was elected trustee upon these  
estates. On the 12th October thereafter, sequestration was also  
awarded against John Hamilton and Company, William Hamil-  
ton and Company, and William Hamilton as an individual; and  
on these estates the respondent, Charles Campbell, was appointed  
trustee. In this capacity he required Boyd Dunlop and Com-  
pany to account to him for one-half share of the profits of the  
joint adventure, and a correspondence took place, on the assump-  
tion on both sides that Campbell, as representing John Hamilton  
and Company, was entitled to an accounting. Campbell con-  
ceiving, however, that Boyd Dunlop and Company were desirous  
for delay, raised, on the 19th December 1814, an action, as  
trustee on the estate of John Hamilton and Company, against  
Boyd Dunlop and Company, before the Magistrates of Glasgow,  
concluding for count and reckoning. In defence, Boyd Dunlop  
and Company at first did not deny their liability to account to  
Campbell as representing John Hamilton and Company, but  
pleaded certain dilatory defences, which were repelled, and an  
interlocutor was pronounced, ordaining them ' forthwith to hold  
' count and reckoning with the pursuer in relation to the joint  
' adventure mentioned in the pleadings, and to produce a special  
' state of the affairs of the said joint adventure, exhibiting the  
' purchases made, the sales effected, and charges incurred on  
' joint account; the stock on hand, and result of the whole joint  
' transactions in point of profit and loss.' Boyd Dunlop and  
Company then objected to Campbell's title, that as he was not  
trustee for Hugh Hamilton, and as the adventure had taken  
place with that person, and not with John Hamilton and  
Company, they were not liable to account to him. The Magis-  
trates, however, on the 3d March 1815, pronounced an inter-  
locutor, repelling this objection, and of new ordaining them to  
account with Campbell.

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In the meanwhile, and prior to this action, Boyd Dunlop and Company had become creditors of Thomson, Gibson and Company, merchants in Leith, by bills accepted by that Company, amounting to L. 648. 16s. 7d., which, after having been indorsed away by Boyd Dunlop and Company to different parties, were returned upon them. The estates of Thomson, Gibson and Company having been sequestrated, Boyd Dunlop and Company, on the 10th of March 1815, lodged a claim upon their estate for the amount of the bills. On the 4th of April thereafter they granted an assignation of the bills to Wallace, Hamilton and Company, merchants in Glasgow, in whose right the appellant, Archibald Wallace, now stood; and at the same time they delivered up the bills bearing the original blank indorsements of Boyd Dunlop and Company, but no new indorsements were granted. On the 7th of the same month, and on the 5th May, Campbell, as trustee of John Hamilton and Company, and in virtue of the dependence of the action against Boyd Dunlop and Company, executed arrestments in the hands of the trustee on the estate of Thomson, Gibson and Company. The assignation obtained by Wallace, Hamilton and Company, was not intimated till the 8th May, being three days subsequent to the date of the last of the arrestments.

Boyd Dunlop and Company having continued to object to the title of Campbell in the action against them, a minute of concurrence by the trustee on Hugh Hamilton's estate was lodged on the 1st December 1815; and on the 4th March 1816 he granted a formal assignation of all right which he had in favour of Campbell. Appearance was thereafter made in the action by Wallace, Hamilton and Company, and the Magistrates thereupon pronounced this interlocutor:—‘ Finds, that the said com-  
 ‘ pearers have not shewn any title to resist decree going out in  
 ‘ the present action, and therefore refuses the desire of the said  
 ‘ minute: Finds it sufficiently instructed, that the joint adventure  
 ‘ in tobacco in question was so far carried on by means of the  
 ‘ credit, and at the risk of John Hamilton and Company: Finds,  
 ‘ that the trustee on the sequestrated estate of Hugh Hamilton,  
 ‘ and the pursuer as trustee on the sequestrated estate of John  
 ‘ Hamilton and Company, to one or other of which estates the  
 ‘ interest in the said joint adventure confessedly belongs, have  
 ‘ waved the rights of the respective creditors of these estates as  
 ‘ in competition with each other, and have united in the present  
 ‘ action in requiring the defenders to hold count and reckoning  
 ‘ with the pursuer, and in insisting on decree going out in favour

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‘ of the pursuer for the balance admitted to be due by the defenders: Finds, that the defenders have no right to object to decree going out for the said balance in favour of the pursuer, as trustee on the estate of John Hamilton and Company, to draw back and take effect from the date of the assignation in the pursuer’s favour by the trustee on the estate of Hugh Hamilton: Farther, finds it appears to be jus tertii to the defenders, whatever it may be to their creditors, to object to decree going out in the pursuer’s favour, to draw back and take effect from the commencement of the present action: Accordingly, upon the whole, decerns also against the defenders in favour of the pursuer, as in the right of John Hamilton and Company, as well as in the right of Hugh Hamilton, for the balance of L. 4133. 8s. admitted to be due by the defenders upon the said joint adventure, and for the dues of extract; reserving to the creditors of the defenders to object to this decree, if so advised, in the proper action for discussing and deciding the competing interests; reserves also to pronounce further in the present action.’ Wallace, Hamilton and Company then produced their assignation, and having reclaimed, the Magistrates ultimately found, that that ‘ action was not the proper or regular process for discussing the validity of the arrestments used by the pursuer on the dependence thereof, in competition with the assignation granted by the defenders to the compearers of the debts stated to have been arrested by the pursuer;’ and therefore adhered to the decerniture. A multiplepinding was then raised before the Court of Session in name of Gibson, Thomson and Company, with the view of settling the question between Campbell, as representing John Hamilton and Company, who claimed to be preferred in virtue of his arrestments, and Wallace, Hamilton and Company, who claimed a preference in virtue of the right acquired from Boyd Dunlop and Company. The action before the Magistrates was then advocated ob contingentiam, and conjoined with the multiplepinding.

In support of their claim, Wallace, Hamilton and Company maintained,—

1. That as Hugh Hamilton had been the partner in the joint adventure, he and his trustee alone had right to demand an accounting from Boyd Dunlop and Company; and therefore, as Campbell was trustee on the estate of John Hamilton and Company, he had no title to raise the action before the Magistrates of Glasgow; and that, although his arrestments were prior in date to the intimation of the assignation, yet as they had been

executed on the dependence of an action in which he had no right to insist, they were inept, and consequently he had no title to appear in the competition: that, although it was true that he had got an assignation from Hugh Hamilton's trustee, yet it was posterior in date to the intimation of Wallace, Hamilton and Company's assignation, and could not have the retrospective effect of creating in him a valid title as at the date of the arrestments.

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2. That, supposing it were to be held that the arrestments were effectual, still, as the bills, bearing the blank indorsation of Boyd Dunlop and Company, were delivered to Wallace, Hamilton and Company on the 4th of April, whereas the first arrestment was not executed till the 7th of that month, and as these indorsations were equivalent to an intimated assignation, and were consequently prior to the arrestments, Wallace, Hamilton and Company were entitled to be preferred.

To this it was answered,—

1. That, assuming it to be true, (which was not admitted), that the joint adventure was entered into with Hugh Hamilton alone, still, as he had made use of the name and credit of John Hamilton and Company, (of which he was the managing partner), all the profits thence arising accrued not to him, but immediately to the Company: that although he had not actually employed the funds of the Company, yet it was sufficient to vest the property in the partnership that he had made use of its name and credit: that besides, as Boyd Dunlop and Company were participant in this, which must be regarded as a fraud on John Hamilton and Company, they were directly accountable to them; and accordingly Hugh Hamilton, in his letter of the 2d August 1814, had desired them to state the accounts in name of that Company: that as Boyd Dunlop and Company were thus directly accountable to John Hamilton and Company, Campbell as their trustee had a good title to insist in the action of count and reckoning; and consequently (independent of the assignation from Hugh Hamilton's trustee) the arrestments were effectual, and being prior in date to the intimation of the assignation in favour of Wallace, Hamilton and Company, must be preferred. And,

2. That the bills could not operate as an intimated assignation, first, Because they were dishonoured documents,—had been delivered as mere accessories to the assignation, and did not bear any new and special indorsation, but merely that which had been originally granted to other parties; and, second, Because, as the estate of Thomson, Gibson and Company, had been seques-

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trated and transferred to a trustee, on which Boyd Dunlop and Company had lodged a claim and affidavit, (which, in terms of the statute, constituted the ground on which they were entitled to the dividends), it was impossible that the delivery of the bills could operate as a transfer of these dividends, and that for that purpose a special assignation was necessary.

The Lord Ordinary pronounced this interlocutor :—‘ Finds  
‘ that Hugh Hamilton, a partner of John Hamilton and Com-  
‘ pany, who carried on business under the same firm, both at  
‘ Liverpool and Greenock, was jointly concerned with Boyd Dun-  
‘ lop and Company, merchants in Glasgow, in various speculations  
‘ in tobacco and other articles: Finds it clearly instructed by the  
‘ whole correspondence, and the books of both parties, that Hugh  
‘ Hamilton engaged in the said joint adventures or trade as an  
‘ individual, and that he, and not John Hamilton and Company,  
‘ would have been liable for the whole loss, if any loss had been  
‘ sustained by such joint trade: Finds it stated, and not contra-  
‘ dicted, that Hugh Hamilton was the managing and only resi-  
‘ dent partner at Greenock, of John Hamilton and Company,  
‘ and that he was prohibited, by the articles of copartnery, from  
‘ engaging in any separate trade; and finds, that in the course  
‘ of the said joint trade, Hugh Hamilton frequently availed  
‘ himself of the credit of John Hamilton and Company, by ac-  
‘ cepting bills to a great amount with the firm of the Company;  
‘ but finds that such bills were always retired, either by the pro-  
‘ ceeds of the joint trade, or by Boyd Dunlop and Company, or  
‘ Hugh Hamilton as an individual, and that no part of John  
‘ Hamilton and Company’s funds was ever employed either in  
‘ retiring said bills, or otherwise, in carrying on said joint trade:  
‘ Finds, that although the improper conduct of Hugh Hamilton,  
‘ in engaging in said joint trade, contrary to the articles of co-  
‘ partnery, and still more in adhibiting the firm of the Company  
‘ to bills drawn in the course of said trade, might have subject-  
‘ ed him in damages to John Hamilton and Company, yet that  
‘ these circumstances could not have the effect of making the  
‘ said Company parties in the said joint trade: Finds, that in a  
‘ confidential letter to Boyd Dunlop and Company, which bears  
‘ the post-mark the 2d August 1814, Hugh Hamilton requests  
‘ them, for private reasons, which he promises afterwards to ex-  
‘ plain, to conceal his name as concerned individually in said  
‘ joint trade, and to make out the accounts relative thereto in  
‘ name of John Hamilton and Company; and finds, that an un-  
‘ signed account was accordingly transmitted by Boyd Dunlop.

June 23. 1884.

' and Company, made up in name of John Hamilton and Com-  
 ' pany, as requested by Hugh Hamilton: Finds, that at this  
 ' period both Hugh Hamilton, as an individual, and John  
 ' Hamilton and Company, as a Company, appear to have been  
 ' in embarrassed circumstances; and finds, that on the 20th  
 ' August following, and within three weeks after he wrote the  
 ' said confidential letter, sequestration was awarded against Hugh  
 ' Hamilton, as an individual; and that, not long after, a sequestra-  
 ' tion was awarded against John Hamilton and Company: Finds,  
 ' that John Dunlop, writer in Greenock, was named trustee on  
 ' the sequestered estate of Hugh Hamilton, as an individual,  
 ' while the memorialist, Charles Campbell, was named trustee  
 ' on the estate of John Hamilton and Company: Finds, that  
 ' Charles Campbell, as trustee on said estate, brought an action  
 ' before the Magistrates of Glasgow against Boyd Dunlop and  
 ' Company, to account to him for the profits on the aforesaid  
 ' joint trade: Finds, that Boyd Dunlop and Company, in de-  
 ' fence against said action, did not at first object to Charles  
 ' Campbell's title, but ultimately they did state such defence,  
 ' and explained that it was with Hugh Hamilton as an indivi-  
 ' dual, and not with Hamilton and Company, that the joint  
 ' trade had been carried on: Finds, that Charles Campbell,  
 ' thereafter, for a valuable consideration, obtained an assigna-  
 ' tion from the said John Dunlop, the trustee on Hugh Hamil-  
 ' ton's estate, to the profits on said trade; and in consequence  
 ' thereof, decree was ultimately pronounced in his favour by the  
 ' Magistrates in said action: Finds, that on the 7th day of  
 ' April and 5th day of May 1815, during the dependence of  
 ' said action, but before the assignation was granted him  
 ' by John Dunlop, Charles Campbell used arrestments in the  
 ' hands of Thomson, Gibson and Company, and of their  
 ' trustee, of a considerable sum due by them to Boyd Dunlop  
 ' and Company: Finds, that on the 4th day of April 1815,  
 ' Wallace, Hamilton and Company, the constituents of the me-  
 ' morialist Archibald Wallace, obtained, for a valuable con-  
 ' sideration, from Boyd Dunlop and Company, an assignation  
 ' to the sum due to them by Thomson, Gibson and Company,  
 ' which was the subject of the aforesaid arrestments, and forms  
 ' the fund in medio in the present process; but finds, that this  
 ' assignation was not intimated until the 8th of May 1815, which  
 ' was posterior to the date of the arrestment: Finds, that the  
 ' said assignation, though not completed till after the arrest-  
 ' ment, was sufficient to carry the fund in medio, in respect that

June 23. 1821. 'the arrestment was inept, having been used at the instance of  
 ' the trustee on the estate of Hamilton and Company, and being  
 ' founded on the aforesaid action brought at his instance against  
 ' Boyd Dunlop and Company, against whom he had no title to  
 ' insist in such action: Finds, that the letter of Hugh Hamil-  
 ' ton to Boyd Dunlop and Company, of the 2d August 1814,  
 ' on which the memorialist, Mr Campbell, founds, as equivalent  
 ' to an assignation by Hugh Hamilton in favour of Hamilton  
 ' and Company, cannot have the effect contended for, both as it  
 ' appears to have been intended for no such purpose, and as it  
 ' was written within less than sixty days of the bankruptcy of  
 ' Hugh Hamilton: Therefore, in the multiplepoiniding ranks  
 ' and prefers the memorialist, Archibald Wallace, upon the  
 ' fund in medio, and decerns in the preference, and for payment;  
 ' accordingly; and in the advocacy advocates the cause, and  
 ' finds that the memorialist, Charles Campbell, was only entitled  
 ' to a decree from the date of the assignation in his favour by  
 ' Mr Dunlop, of date the 4th March 1816: quoad ultra, assol-  
 ' zies the memorialist, Archibald Wallace, and decerns.' Camp-  
 ' bell having reclaimed, the Court recalled ' the interlocutor of  
 ' the Lord Ordinary reclaimed against: Find, that Dunlop and  
 ' Company were bound to account to the petitioner, as Hamil-  
 ' ton and Company's trustee, and that the action was duly and  
 ' competently brought; decern in favour of the pursuer for  
 ' L.4,133. 8s. being the admitted balance found due by the  
 ' interlocutors of the Magistrates, the decree to have effect as  
 ' from the date of the libel in the Inferior Court; and, in the  
 ' multiplepoiniding, prefer the petitioner to the fund in medio,  
 ' and decern in the preference, and for payment, accordingly;  
 ' and, quoad ultra, remitted to the Lord Ordinary to proceed in  
 ' the accounting between Boyd Dunlop and Company, and found  
 ' Wallace, Hamilton and Company, liable in expenses. To this  
 ' judgment their Lordships adhered upon the 8th June 1821.\*

In the meanwhile, Wallace, Hamilton and Company, had  
 ' uplifted the dividends from Thomson, Gibson and Company;  
 ' on caution, and the Lord Ordinary having ordained them to  
 ' consign the amount, they reclaimed; but the Court, on the 20th  
 ' June 1822, adhered.†

Against these judgments, Wallace, as in right of Wallace,  
 ' Hamilton and Company, appealed. But the House of Lords

\* See 1. Shaw and Ballantine, No. 65.

† Ibid. No. 557.

‘ ordered and adjudged, that the appeal be dismissed, and the June 23. 1894.  
‘ interlocutors complained of affirmed.’

*Appellants' Authorities.*—3. Ersk. 5, 6; M'Adam, June 14. 1787, (1612.); Freer,  
Nov. 18. 1806, (No. 19. App. Bill of Exchange); Ewart, Rutson and Company,  
s. Richardson, Jan. 28. 1819, (not reported).

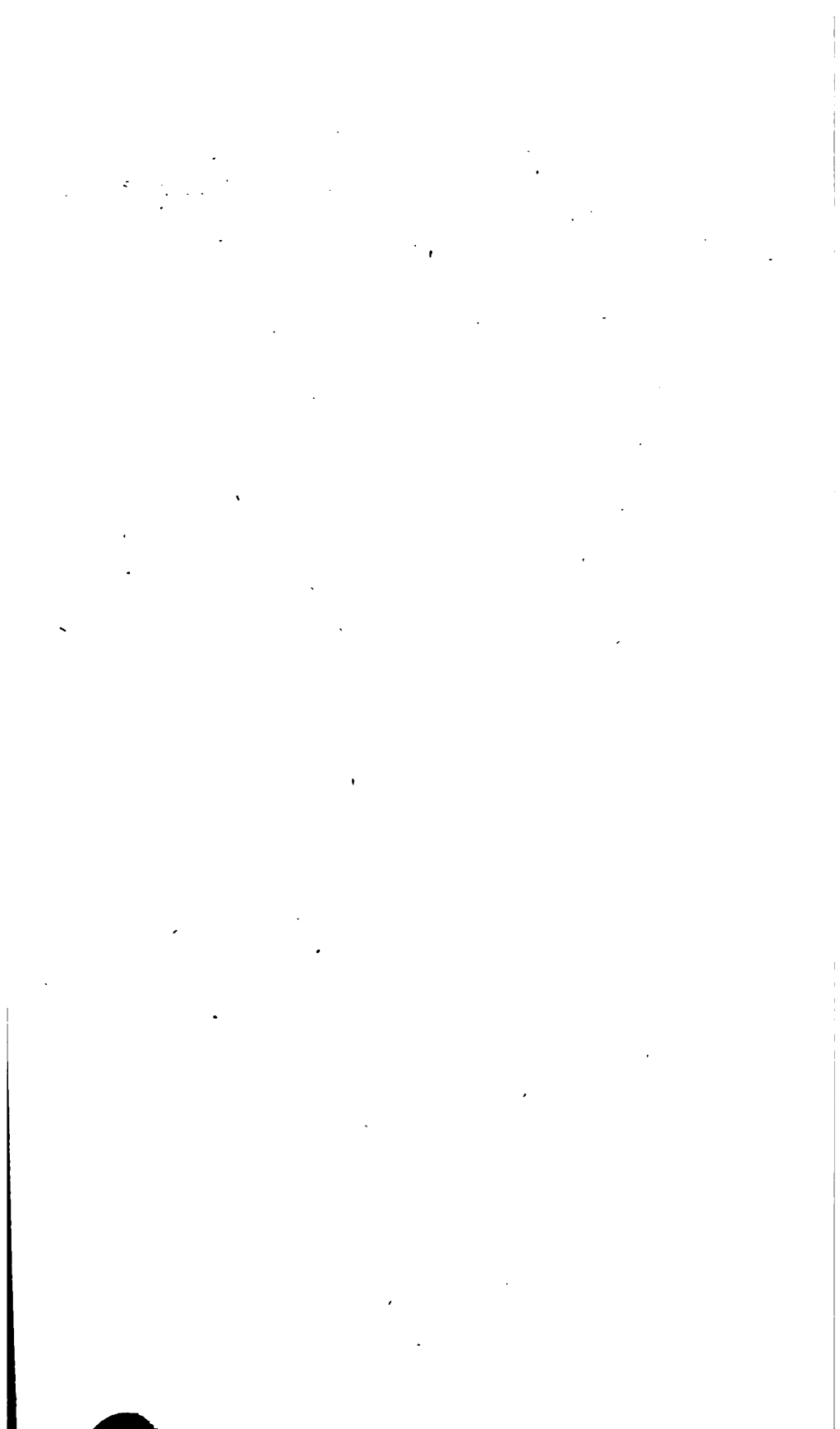
*Respondents' Authorities.*—2. Bell, 506; 1. Montague, 101.; 5. Vesey, 193.; 15.  
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J. RICHARDSON—MONCREIFF and WEBSTER,—Solicitors.

( *Ap. Ca. No. 80.* )

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\* For DUNBAR, in the title of the case, read DUNCAN.

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**ADJUDICATION.**—A party being in possession of an estate under an *ex facie* good title, but not infest, and another party, with a view to make up a tentative title to the estate, having executed a disposition of it in favour of his agent, *ex facie* absolute, but qualified with a back-bond declaring that it was in trust; and the trustee having brought an adjudication of the estate, founding on the disposition;—Held, (affirming the judgment of the Court of Session), 1. That the party in possession was entitled to object to the adjudication; and, 2. That it was not competent to adjudge the estate on such a disposition. No. 17. p. 115.

**AGENT AND CLIENT.**—An agent having been employed to recover a debt for a client, (for whom he was also trustee), which at one time had been considered almost desperate; and having got a decree for upwards of L. 1400, and a warrant for payment of L. 1000; and having informed the client of this latter circumstance, and requested to know what he would allow him for having realized so large a part of the debt, and incurred so much risk, trouble and expense; and having narrated the circumstances in a power of attorney, which the client executed in his favour, but not having transmitted his account of expenses, which amounted to only L. 18; and the client having agreed to discharge him on paying L. 500, and to allow him to keep the residue;—Held, (affirming the judgment of the Court of Session), That the discharge was not binding, and that the client was entitled to recover payment of the balance of the debt. No. 34. p. 233.

—Circumstances in which (affirming the judgment of the Court of Session) a claim of retention by an agent of ten per cent on the sum recovered by him on behalf of clients, founded on an alleged agreement to that effect, was repelled; but a reservation made in his favour, to claim any account of expenses which he might have against the clients. No. 36. p. 251.

—An agent having been employed to appear for a client in a submission, and to recover payment of part of a debt due to him, in virtue of bonds under which it appeared to be still resting owing; and having stated his case on that assumption, and obtained a decree-arbitral; and thereafter being made aware that the debt had been fully paid, but having no authority to reveal this; and having received payment of the money, and remitted it to another agent of the client, who paid part of it to the client, and agreed to pay the residue to other parties having interest; and it having been found that the decree-arbitral could not be reduced;—Held, (reversing the judgment of the Court of Session), That the agent was not liable in repetition to those from whom he had recovered payment. No. 37. p. 252.

AMELIORATIONS.—See *Real Burden*.

AMENDMENT OF LIBEL.—See *Process*.

APPEAL.—The Court of Session having suspended a charge on a bill against an indorser, and found the charger liable in expenses, which he was compelled to pay; and the charger having appealed against the interlocutor; and a decree of reduction of the bill, pending the appeal, having been obtained by the drawer; and the House of Lords having reversed the interlocutor, and remitted to the Court of Session to make certain investigations; and the Court of Session having, in respect of the decree of reduction, refused to order the expenses to be repaid to the charger, and found it unnecessary to proceed with the remit;—Held, (reversing the judgment of the Court of Session), 1. That the Court was bound to have carried the remit into execution; and, 2. That the charger was entitled to repetition of the expenses. No. 45. p. 357.

—See *Trustee*.

APPROBATE AND REPROBATE.—See *Deathbed*.

APPROPRIATION.—See *Repetition*.

BANK AGENT.—See *Cautioner*.

BANKRUPT.—*Statute 54. Geo. III. c. 137*.—A creditor of a Company under sequestration having adopted legal proceedings for recovery of his debt against one of the partners in Jamaica, (whose estate had not been sequestrated); and the Provost Marshall of the island having incurred a liability for the debt, by suffering the partner to escape, and having paid the debt; and the trustee on the estate of the Company having brought an action against the creditor for repetition of the money, alleging that the debt was paid out of the proceeds of the Company's estate delivered to the Provost Marshall; and having produced a correspondence between himself and his attorney to prove that fact;—Held, 1. (reversing the judgment of the Court of Session), That the creditor was not bound to repeat; and, 2. That the correspondence was evidence against, but not in favour of, the trustee. No. 4. p. 25.

—An appeal dismissed against an order in a sequestration for choosing commissioners, after an appeal entered against a judgment awarding sequestration, which had in the meanwhile been affirmed. No. 5. p. 30.

BANKRUPT.—See *Sequestration*—*Jus Crediti*—*Trustee*—*Prescription*.

BILL OF EXCHANGE.—See *Partnership*—*Principal and Agent*.

BONA FIDES.—A tenant having acquired and possessed under a lease granted in consideration of payment of a grassum and of the former rent, by an heir in possession under an entail prohibiting the granting of leases with evident diminution of the rental; and it having been the practice under that entail to grant such leases, and the opinion of lawyers and others that they were effectual; and one Division of the Court of Session having by repeated judgments found them lawful, and the majority of the whole Judges being of that opinion, but the House of Lords having found that the heir had no power to grant such leases;—Held, (affirming the judgment of the Court of Session), That the tenant was a bona fide possessor till the judgment of the House of Lords, and was not liable in violent profits prior to its date. No. 8. p. 43.

—An heir possessing under an entail prohibiting the granting of leases with evident diminution of the rental, having let the lands for payment of the former rents and grassums; and the

First Division of the Court of Session having, at the instance of a succeeding heir, set aside the leases, as being granted in fraud of the entail; but the Second Division having sustained similar leases; and it being the opinion of a great majority of the Judges, on a remit from the House of Lords, that they were valid; and this being also the prevailing opinion of lawyers and others; and the House of Lords having found that the heir had no power to grant such leases, and the leases having been reduced on that ground;—Held, 1. (reversing the judgment of the Court of Session), That no claim of damages lay against the representatives of the granter by the succeeding heir, but reserving his claim for payment of the grassums; and, 2. (affirming the judgment), That the tenants were protected by bona fides from payment of violent profits prior to the judgment of the House of Lords. No. 11. p. 70.

**BONA FIDES.**—See *Judicial Factor—Violent Profits*.

**CAUTIONER.**—Cautioners having granted bond to the Bank of Scotland to the extent of L.10,000, for the due performance of the duties of joint agents by two persons, one of whom became a partner of a mercantile Company, which was known to the Bank; and the joint agents having granted large accommodations to that Company, and to that agent individually; and these accommodations having become known to the Bank, who remonstrated against them as extra-official and extravagant, but who did not give any notice thereof to the cautioners, nor dismiss the agents; and having thereafter taken a promissory-note from one of the agents, for the amount of bills which were past due and exigible from both agents, payable three months thereafter, and got an heritable bond in security thereof;—Held, (reversing the judgment of the Court of Session), That the cautioners were not bound to implement their bond of caution. No. 43. p. 316.

**CHURCHYARD.**—A clergyman and one of his sons having been buried in a spot adjacent to, and in front of, the parish church, where the minister had his burial-place; and the church having been transported to another part of the parish; and the area, with the burial-place, having been excaused and conveyed to one of the heritors, who included them in his pleasure-grounds;—Held, (affirming the judgment of the Court of Session), That a son of the clergyman was entitled to insist on having the graves protected by a fence; and that he and the other near relations were entitled to visit the graves at all proper times. No. 14. p. 104.

**CLAUSE.**—Construction of a clause of a deed of settlement. No. 28. p. 202.

**CLAUSE.**—See *Service—Partnership*.

**COAL.**—See *Mutual Contract*.

**COLLISION OF SHIPS.**—One ship having run down another, and this having been occasioned equally by the fault of both;—Held, (reversing the judgment of the Court of Session), That the owners of the ship which ran down the other were liable only for the one-half of her value, provided that did not exceed the value of their own ship. No. 49. p. 395.

**COMMISSION OF BANKRUPTCY.**—See *Sequestration*.

**COMMONTY,** No. 20. p. 146.

**COMPETITION.**—See *Partnership*.

**CONFUSION.**—See *Passive Title*.



**COUNSEL.**—See *Entail*.

**DEATHBED.**—A party having executed a *mortis causa* disposition of his heritable property in liege poustie, excluding one of his heiresses-portioners, with a power of revocation; and having executed a second disposition on deathbed in favour of the same parties, but making alterations affecting interests provided for in the first deed, and having revoked that first deed;—Held, (affirming the judgment of the Court of Session), 1. That the heiress-portioner was entitled to found on the revocation, as recalling the first deed; and, 2. That she was at the same time entitled to object to the disposition of the property, as executed on deathbed. No. 2. p. 9.

**DIVORCE.**—A wife having brought an action of divorce, on the ground of adultery, against her husband, which was opposed by the trustee for his creditors, so far as related to the pecuniary consequences; and the wife having emitted an oath de calumnia, and denied collusion; and the trustee having offered a proof of collusion; and the guilt of the husband having been established;—Held, (affirming the judgment of the Commissaries and the Court of Session), 1. That the proof offered by the trustee, after the oath of calumny, was incompetent; and, 2. That the wife was entitled to decree of divorce in the usual terms, without any qualification as to the right of the creditors of the husband. No. 51. p. 435.

**DONATION, OR ANTICIPATED PAYMENT OF LEGACY.**—Circumstances under which it was held, (affirming the judgment of the Court of Session), That a sum of money paid by a testator to persons to whom he had bequeathed one-half of his effects, was an anticipated payment of their provision, and not a donation. No. 52. p. 445.

**ENTAIL.**—*Stat. 38. Geo. III. c. 60. and 99. Geo. III. c. 6. and 40.* Held, (affirming the judgment of the Court of Session), 1. That it is not relevant to set aside a sale of part of an entailed estate for redemption of the land-tax under the above statutes, that the Court has committed an error in judgment as to the execution thereof. And, 2. That it is not a valid objection that the lands have been purchased by the Counsel who subscribed pro forma the petition and other papers necessary for obtaining the authority of the Court for the sale. No. 1. p. 1.

—An heir in possession under an entail prohibiting the granting of leases with evident diminution of the rental, having let the lands on payment of grassums, and for the former rents; and it having been found by the House of Lords,—contrary to the opinion of the majority of the Judges in the Court of Session, and contrary to what had been the practice under the above and similar entails,—that the heir had no power to grant such leases; and no declarator of irritancy having been brought against the heir during his life, but an action of damages having been instituted after his death against his representatives;—Held, (affirming the judgment of the Court of Session, with a qualification), That the representatives were not liable in damages. No. 9. p. 54.

**ENTAIL.**—See *Bona Fides*.

**EXCHEQUER.**—See *Public Officer*.

**EXECUTION PENDING APPEAL.**—See *Lien*.

**FACILITY.**—See *Fraud*.

**FISHING.**—See *Stake-Nets*.

**FOREIGN.**—See *Prescription*.

**FRAUD.**—Circumstances under which (affirming the judgment of the

Court of Session) a deed was set aside, which had been obtained from a facile person, nearly 80 years of age, whereby he discharged a debt of £.3000, heritably secured, for a bill of £.230, and an annuity of 7½ per cent during his life, for payment of which no security was granted. No. 29. p. 206.

**FRAUD.**—Circumstances under which (qualifying but affirming the judgment of the Court of Session) an heritable security was reduced, which had been obtained from a facile young man, for an alleged balance owing by his deceased father, arising out of a complicated state of accounts, which were not rendered to him, and for which, if there was truly a balance, other parties were liable. No. 30. p. 212.

**FRAUD.**—See *Title to Pursue—Agent and Client.*

**GUARANTEE.**—See *Title to Pursue.*

**HERITABLE CREDITOR.**—See *Sequestration.*

**HUSBAND AND WIFE.**—See *Divorce.*

**INSURANCE.**—An insurance having been made on goods to be exported from Leith to Gottenburgh, (at a time when Sweden was at peace with Britain, but when the importation of British goods was prohibited), with power to carry simulated papers, and any flag whatever; and the vessel having sailed on the voyage, but having been captured by a British ship under a mistake, and brought back to Leith; and having afterwards been released; and having, after war was known to have been declared by Sweden against Britain, again sailed to Gottenburgh; and having been captured by the *Danes*, and, together with the goods, condemned;—Held, (reversing the judgment of the Court of Session), That the underwriters were liable. No. 47. p. 373.

**INTEREST.**—A party who was a native of Scotland, but resident at New-York as a merchant, having brought an action before the Court of Session against two Scotchmen carrying on business in Jamaica, in regard to transactions which took place in America and the West Indies, without founding a jurisdiction; and having concluded against them for payment of a sum in sterling money, with the legal interest thereon; and the Court of Session having, under the circumstances of the case, sustained their jurisdiction; and the parties having then gone into a long and intricate litigation; and the Court having decreed for a sum in dollars, (being the money in which the accounts were kept), and found, that under the conclusions of the summons the pursuer could not insist for American interest;—The House of Lords refused to open up the question of jurisdiction; found that decree should have been given in sterling money; that interest at five per cent was due on the principal; and in part reversed the judgments as to the amount of the principal sum. No. 53. p. 451.

**IRRITANCY.**—See *Landlord and Tenant.*

**JUDICIAL FACTOR.**—A judicial factor having been appointed on an estate pending a competition, and the widow of the last proprietor having worked quarries in her locality lands, and enjoyed the proceeds, and having been found not liable to repeat these proceeds, as having consumed them bona fide; and another party having, under a title ex facie good, drawn part of the rents of the estate, and been also found a bona fide possessor; and the judicial factor having been authorized to appoint sub-factors; and having paid a reasonable salary to a sub-factor; and (under the above exceptions)

having uplifted the rents and feu-duties of the estate;—Held, 1. (affirming the judgment of the Court of Session), That he was not liable to account for the proceeds of the quarry and the rents, nor for the sum given as salary to the sub-factor. But, 2. (reversing the judgment), That he was bound to account for all the interest received by him on the rents and profits uplifted by him. No. 3. p. 18.

JUDICIAL REMIT.—See *Landlord and Tenant*. (4.)

JURISDICTION.—Held, (affirming the judgment of the Court of Session), That an action of damages is not competent against a Supreme Judge, for a censure passed by him, while acting in his judicial capacity, on a Counsel practising at the Bar, and engaged in the cause then before the Court, although it was alleged that the censure had been made injuriously, and from motives of private malice. No. 19. p. 125.

JURISDICTION.—See *Interest—Repetition of Expenses*.

JURY COURT.—A case having been remitted to the Jury Court by the Inner-House, and thereafter transmitted back to decide certain points of law;—Held, (affirming the judgment of the Court of Session), That it was competent, notwithstanding, to order the proof to be taken on commission. No. 48. p. 386.

JUS CREDITI, or SPES SUCCESSIONIS.—A party, in consideration of the renunciation of a lease by his son, who was about to be married, having granted a bond of provision obliging himself to pay to the children of the marriage a sum of money at the first term after his own death; and a relative contract of marriage having, on the faith thereof, been executed between the son and his intended spouse, by which the bond was assigned to trustees for behoof of the children nascituri; and the granter having become bankrupt, and children having come into existence;—Held, (affirming the judgment of the Court of Session), That the children were entitled to be ranked as creditors on the estate of the granter of the bond. No. 26. p. 183.

LANDLORD AND TENANT.—Circumstances in which a judgment of the Court of Session, refusing a bill of suspension of a decree of irritancy of a lease by a Sheriff, was affirmed. No. 6. p. 30.

Held, (affirming the judgment of the Court of Session), 1. That a singular successor is bound by a stipulation in a lease to pay for the value of houses which were erected prior to his purchase of the property. 2. That a tenant is not liable in damages for retaining the keys of the house, after tendering them on condition that the landlord should concur in getting the value of the houses ascertained. 3. That a landlord is not entitled, at the termination of a lease, to claim damages from the tenant for mislabouring, where during the currency of the lease he has made no objection, and where there have been no rules laid down in the lease as to cultivation. And, 4. That a party who has consented to a remit to a professional person to report on disputed facts, is not thereafter entitled to insist on a proof. No. 7. p. 37.

LANDLORD AND TENANT.—See *Mutual Contract*.

LIEN.—A party having been employed as a mercantile agent to purchase and ship goods for a Company, on which he made large advances; and having by their orders purchased other goods as their broker, and of which he obtained possession, but on which he did not make any advances; and it having been afterwards dis-

closed that these latter goods formed part of a joint adventure, in which the Company and others were concerned;—Held, in a competition with the creditors of the joint adventure, (qualifying the judgment of the Court of Session), 1. That the agent had no lien over these goods for security and payment of the general balance due to him, and arising out of the transactions with the Company; and, 2. (affirming the judgment), That the agent was bound, in a multiplepounding relative to the price of these goods, and after the claim of lien had been rejected, to consign the whole proceeds, although one of his competitors had drawn dividends to an extent which considerably diminished his debt,—there being other claimants on the fund. No. 27. p. 188.

**LIS ALIBI.**—See *Warrandice*.

**MARRIAGE-CONTRACT.**—See *Service*.

**MUTUAL CONTRACT.**—A lease of coal having been granted, with a stipulation that if the coal, 'by unforeseen accidents' occurrence, 'dykes, or troubles not occasioned by irregular or improper workings, it shall become, in the opinion of skilful men, mutually chosen by the parties, incapable of being wrought to advantage,' the tenant should be entitled to abandon; and men having been appointed, who reported, that, so far as physical difficulties existed, the coal was capable of being worked, but that, from the state of the markets, &c. this could not be done to advantage;—Held, (qualifying the judgment of the Court of Session), That the tenant was not entitled to abandon. No. 24. p. 175.

**ONUS PROBANDI.**—See *Proof*.

**PARTNERSHIP.**—Two parties having entered into a contract of partnership for working coal, under which a permission, in general terms, was granted to work coals in the lands of one of them, by means of pits sunk in the lands of the other; and having thereafter entered into another contract, prorogating the whole terms of the first contract, but declaring that the coal in the lands of the first party should be worked only to the east of a certain point;—Held, (reversing the judgment of the Court of Session), That the Company had no right to work beyond that point. No. 32. p. 225.

— A partner of a Company having entered into a joint adventure with another, and made use of the name and credit of the Company; and the estates of the Company having been sequestrated, and a separate sequestration awarded against the partner; and different trustees having been appointed; and the trustee of the Company having raised an action against the other joint adventurer, to account to him, and on the dependence having arrested dividends due to that joint adventurer out of the estates of the sequestrated Company; and the joint adventurer having previously granted an assignation of these dividends to another party, and delivered relative dishonoured bills accepted by the sequestrated Company, which had been originally indorsed away and discounted by the joint adventurer, but had been returned on him; and the assignation not having been intimated till subsequent to the arrestments;—Held, (affirming the judgment of the Court of Session), That the arrestments by the trustee for the Company were preferable, both to the assignation and bills held by the party acquiring them from the joint adventurer. No. 55. p. 467.

**PASSIVE TITLE.**—A party having obtained himself served heir-male and heir of line of another, and having intromitted with the rents

of an estate to which he had right as heir-male; and having there-after, within year and day of the death of the defunct, made up inventories, and brought a ranking and sale of the estate, and paid the debts of the defunct, and taken assignations to them in favour of himself, his heirs and assignees;—Held, (affirming the judgment of the Court of Session), 1. That by his service and intromissions he became universally liable for the debts of the defunct; and, 2. That they were extinguished by his having paid them; and, therefore, that his representatives could not, in virtue of the assignations, recover payment of them from an heir-male who afterwards succeeded to the estate. No. 18. p. 118.

**POINDING OF THE GROUND.**—See *Real Burden*.

**PRESCRIPTION.**—A Scottish bankrupt under sequestration having gone to Russia, and resided there for more than ten years, and till his death; and having left a fortune, to which his daughter, residing in Scotland, succeeded; and she having brought an action of declarator before the Court of Session against her father's creditors, to have it found that the debts were extinguished by the decennial prescription of Russia, and null and void; and the Court having decreed in terms of the libel;—The House of Lords found, That the debts were not null and void, and extinguished; but remitted to the Court of Session to make further inquiries into the effect of the law of Russia, under the circumstances of the case. No. 50. p. 406.

**PRINCIPAL AND AGENT.**—An agent for a Company having in his own name drawn bills on a purchaser of goods from the Company, which the purchaser accepted, and having discounted them with a banker, by indorsing them also in his individual name, and he and the purchaser having become bankrupt;—Held, (reversing the judgment of the Court of Session), That although the agent was in the practice of drawing and discounting bills, sometimes in his own name, and at othera per procuracion of the Company, and the Company settled with the purchaser on the footing of his having granted these bills, yet, as the name of the Company was not on the bills, no claim lay against it for payment of them. No. 31. p. 219.

**PROCESS.**—Held, (affirming the judgment of the Court of Session), That it is competent, before great avizandum is made with an action of reduction on the head of forgery, to amend the libel, by adding deathbed as an additional reason. No. 15. p. 110.

—Circumstances under which it was held, (affirming the judgment of the Court of Session), 1. That a party who had been employed to erect buildings, and had rendered an account, and raised a summons for a certain sum as due to him, was entitled to amend his summons, so as to conclude for a larger sum reported by valutors to be due to him; and, 2. That an amendment of the libel, which was lodged after the report of the valutors, had been acquiesced in by the defender, and therefore could not be objected to as incompetent. No. 54. p. 461.

—See *Interest*—*Jury Court*—*Trustee*.

**PROOF.**—A party having been served lawful heir of another; and a reduction of the service being brought; and it being alleged that he was proved to be habit and repute, a bastard;—Question raised and discussed as to whether it was incumbent on the party averring bastardy to establish that fact, or whether the proof of being so by

habit and repute, threw the burden of proving legitimacy on the other party. No. 21. p. 147.

**PROOF.**—See *Bankrupt*.

**PUBLIC OFFICER.**—*Stat. 6. Queen Anne, c. 26.*—Held, (affirming the judgment of the Court of Session), That the Barons of Exchequer are entitled to appoint a messenger and porter to perform the menial services of the Court, although another party be vested with the right of heritable usher and door-keeper of the Court, and of appointing deputies; and although he offered to prove, that he and his deputies had been in the practice of performing the same services as those executed by the persons so appointed. No. 16. p. 113.

**REAL BURDEN.**—Held, (affirming the judgment of the Court of Session), 1. That it is competent to constitute a real burden on lands by a resignation ad remanentiam, effectual against a singular successor; 2. That the creditor in such real burden is entitled to pursue a poinding of the ground; and, 3. That he is entitled to sell the lands without accounting for ameliorations made by the singular successor. No. 23. p. 162.

**REPARATION.**—See *Bona Fides—Entail—Jurisdiction—Warrandice—Collision of Ships—Slander.*

**REPETITION.**—A debtor having ordered a Company to hold funds, to be remitted to them for behoof of his creditor, and the Company having agreed to do so by a letter to the creditor; and money having been remitted to them, but they having thereafter per incuriam paid it to the debtor; and, after consulting a law adviser, having paid it a second time to the creditor;—Held, (reversing the judgment of the Court of Session), That the Company was not entitled to repetition from the creditor. No. 42. p. 310.

**REPETITION OF EXPENSES.**—See *Appeal.*

**REPETITION.**—See *Agent and Client—Bankrupt.*

**RES JUDICATA.**—See *Stake-Nets.*

**RETENTION.**—See *Agent and Client—Lien.*

**REVOCATION.**—See *Deathbed.*

**SALE.**—See *Entail.*

**SALMON-FISHING.**—See *Stake-Nets.*

**SEFULCHRE.**—See *Churchyard.*

**SEQUESTRATION.**—A domiciled Scottish merchant having, after contracting debts in Scotland, gone to England, and there committed an act of bankruptcy; and a petition for sequestration having been presented to the Court of Session, founding on a bill written on a wrong stamp, and an affidavit to the verity of the debt; and a deliverance having been written on the petition prior to the issuing of a regular commission of bankruptcy;—Held, (affirming the judgment of the Court of Session), 1. That the sequestration was preferable to the commission of bankruptcy; and, 2. That the affidavit to the verity of the debt was sufficient to support the petition, accompanied by the bill. No. 33. p. 230.

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Circumstances under which (reversing the judgment of the Court of Session) a creditor, holding a bond and assignation, in security of a lease, for payment of a debt due to him by a party whose estates were afterwards sequestered; and who was ranked, and appointed a commissioner, and received payment of his debt, by a transaction with the other creditors, on the foot-

ing of being an heritable creditor, was found not liable for the expenses of the sequestration. No. 39. p. 291.

**SEQUESTRATION.**—The trustee on a sequestrated estate having obtained a decree of reduction of a bill on which a party claimed against the estate; and that party having brought a reduction reductive of the decree; and a majority of the creditors assembled at a meeting having resolved that this action should not be opposed, and that the decree should be allowed to be set aside; and the Court of Session having found that a majority had no power to do so;—Held, (reversing the judgment), That the majority had that power, and that their resolution was binding on the minority. No. 46. p. 362.

**SEQUESTRATION.**—See *Trustee—Bankrupt*.

**SERVICE.**—A party having, by an antenuptial contract of marriage, disposed his estate to the heir-male of the marriage, 'and to the heirs and assignees whatsoever of the said heir-male in fee; whom failing, the heir-male of any subsequent marriage, and the heirs of his body; whom failing, to the heir-female, or eldest daughter of the marriage, and who should always succeed without division; and a son of the marriage having existed, but died without issue, leaving three sisters;—Held, (affirming the decision of the Court of Session), That the three sisters had right to the estate, as heirs-portioners of their brother, and not the eldest without division. No. 22. p. 149.

**SINGULAR SUCCESSOR.**—See *Landlord and Tenant*.

**SLANDER.**—Circumstances in which (affirming the judgment of the Court of Session) an action of damages, founded on alleged slanderous expressions made use of in judicial proceedings, was sustained. No. 35. p. 245.

**STAKE-NETS.**—*Statute 1563, c. 68.*—An action having been brought against certain parties who had rights of salmon-fishing in the river Dee, and had placed yairs within tide-mark, to have it found that they had no right to do so; and the Court of Session having found that they fell within the exception of the statute 1563, c. 68. as being situated within the water of Solway: and thereafter the same parties having erected stake-nets at the same place; and a bill of suspension and interdict against their doing so having been refused: and a declarator having then been brought to have it found that they were not entitled to fish with stake-nets; and the Court of Session having sustained a defence of *res judicata*, in respect of the decree in the former action and in the suspension;—the House of Lords reversed the judgment sustaining that defence, and remitted to the Court of Session to make farther inquiries as to whether the yairs were within the water of Solway or not. No. 40. p. 299.

**STAMP.**—See *Sequestration*.

**TESTING CLAUSE.**—*Statute 1681, c. 5. and 1696, c. 15.*—Circumstance under which (affirming the judgment of the Court of Session) objections to a bond of caution, that it had not been signed at the time or place, nor before the witnesses mentioned in the testing clause, were repelled. No. 38. p. 265.

**TITLE TO OBJECT.**—See *Adjudication*.

**TITLE TO PURSUE.**—An indorsee of a bill having, in consideration a premium, obtained a guarantee of it from A, to whom he delivered, but did not indorse it; and the bill having been dishonoured, and the drawers of it having granted to a trustee for A to

promissory-notes in place of it; and B having bound himself by a letter to see them paid;—Held, 1. (affirming the judgment of the Court of Session), That the trustee for A was entitled to pursue B for payment of the promissory-notes; and, 2. That it was not relevant for B to allege that the original indorsee was a party to a general agreement, under which B had been induced, by the misrepresentation of the drawers, to guarantee to their other creditors the payment of a part of their debts. No. 13. p. 97.

**TITLE TO PURSUE.**—See *Partnership*.

**TRUST-DISPOSITION.**—See *Adjudication*.

**TRUSTEE.**—Circumstances under which (affirming, but qualifying the judgment of the Court of Session) it was held, 1. That the trustee on a sequestrated estate was liable personally to implement a contract entered into by him on behalf of the estate; and, 2. That an appeal against the interlocutor of a Lord Ordinary, not brought under review of the Inner-House, was incompetent. No. 44. p. 349.

**VIOLENT PROFITS.**—Circumstances in which (affirming the judgment of the Court of Session) a party was found not liable for violent profits, prior to the first term after the judgment of the House of Lords setting aside the lease as contrary to the terms of an entail. No. 25. p. 181.

**WARRANTICE.**—An heir in possession under an entail prohibiting alienation and granting of leases with evident diminution of the rental, having granted a lease for payment of a grassum, and binding himself to warrant the lease; and having died, leaving one set of executors in England, and another set in Scotland; and the former having lodged the executry funds in the Court of Chancery in England, and called on all having claims to give them in; and the tenant having claimed a certain sum as damages in the event of his lease being set aside; and thereafter his lease having been reduced;—Held, (affirming the judgment of the Court of Session), 1. That the tenant was not barred by the proceedings in Chancery from raising an action before the Court of Session, claiming reparation on the warrantice from the Scottish executors; and, 2. That he was entitled to reparation. No. 10. p. 63.

—An heir in possession under an entail, who was uncertain as to the extent of his powers in granting leases, having, on payment of a grassum, granted one for 31 years, or such other period as it should be found he had power to do; and having warranted the possession for 31 years, and the leases having been set aside as ultra vires;—Held, (affirming the judgment of the Court of Session), That the representatives of the granter were bound, under the warrantice, to make reparation. No. 12. p. 80.

**WRIT.**—See *Testing Clause*.









